Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL RICHARDSON,
Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether petitioner's death sentence violates *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), because the trial court's refusal to give a separate mitigation instruction unconstitutionally precluded trial counsel from presenting compelling mitigating evidence of childhood physical and sexual abuse and also precluded the jury from giving effect to the mitigating evidence that was presented.

2. Whether this Court's ruling in *Gray* v. *Mississippi*, 481 U.S. 648 (1987), was violated when the admittedly erroneous excusal of a juror who had been qualified to serve under *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), was ruled on direct appeal to be harmless error.

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RULE

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Petitioner Miguel A. Richardson respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, dated January 23, 2001.

OPINIONS BELOW

The panel opinion of the Court of Appeals affirming the United States District Court for the Western District of Texas' denial of a certificate of appealability ("COA") is unpublished and can be found at pages 2 to 12 of the Appendix. This decision is unofficially reported at 2001 U.S. App. LEXIS 1621 (5th Cir. Jan. 23, 2001) and the unpublished opinion is attached. (App. 2-12) The unpublished opinion of the district court denying federal habeas corpus relief and a COA can be found at pages 17-186 of the Appendix. The unpublished opinion of the district court denying petitioner's motion to alter or amend the judgment is also attached. (App. 13-16)

The order and opinion of the Texas Court of Criminal Appeals ("CCA") adopting the recommended findings of fact and conclusions of law of the 175th District Court, Bexar County, Texas, and denying a post-conviction writ of habeas corpus is not officially reported. (App. 289-95) The district court's opinion is unpublished. (App. 445-79)

On direct appeal, this Court *twice* granted *certiorari*, vacated the judgment and sentence, and remanded to the CCA. *Richardson* v. *Texas*, 509 U.S. 917 (1993); *Richardson* v. *Texas*, 492 U.S. 914 (1989). The opinion of the CCA upon the second remand is reported at 901 S.W.2d 941 (Tex. Crim. App. 1994). (App. 189-96) The order of the CCA denying Mr. Richardson's subsequent motion for rehearing is unpublished and appears on the court's docket sheet. (App. 480-86) The opinion of the CCA upon the first remand is reported at 886 S.W.2d 769 (Tex. Crim. App. 1991).

(App. 197-226) The order of the CCA denying Mr. Richardson's subsequent motion for rehearing is unpublished and appears on the court's docket sheet. (App. 480-86) The opinion of the CCA on direct appeal is reported at 744 S.W.2d 65 (Tex. Crim. App. 1987). (App. 229-88) The order of the CCA denying Mr. Richardson's subsequent motion for rehearing is unpublished and appears on the court's docket sheet. (App. 480-86)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on January 23, 2001. This petition is being timely filed within 90 days of that judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1993). Petitioner first invoked federal jurisdiction in this case in 1998 under 28 U.S.C. § 2254 (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The text of these amendments is set forth at pages 187 to 188 of the Appendix. This case also involves section 19.03 of the Texas Penal Code and articles 35.16(a)(10) and 37.071(b) of the Texas Code of Criminal Procedure, as it existed in 1981. The text of these provisions is set out at pages 296-300 of the Appendix.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case comes before this Court for a fifth time due to the persistent refusal of the Texas courts on remand to follow the mandate set forth in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"). In the *Penry* case itself, the Texas courts ignored this Court's specific instructions, leading to the recent grant of *certiorari* and argument in that case for a second time. *Penry* v. *Johnson*, 121 S. Ct. 563 (2001) ("*Penry II*"). The Texas courts have likewise ignored the basic reasoning of *Penry I* in this case. At trial, Petitioner presented sufficient mitigating evidence that this Court *twice* remanded the case to the Texas Court of Criminal Appeals for reconsideration in light of *Penry I* and its progeny. Both times, however, the CCA majority marginalized the mitigating evidence of Petitioner's character and background which clearly warranted reversal under *Penry I*. Moreover, on both remands, the CCA refused to consider the fact that the absence of a *Penry*-type instruction had deterred trial counsel from developing and presenting additional compelling evidence of childhood physical and sexual abuse — evidence finally adduced at the state habeas hearing — which Petitioner had a right to have the jury consider as mitigating.

As the state habeas record shows (App. 400-39), Petitioner endured a violent childhood during which he was subjected to physical and sexual abuse. He was brutally beaten by his father, who also threatened him with guns and stabbed him as punishment for having taken a nap in the nude. He was also sexually and physically abused by his older sister and his older brother.

The trial jury never heard any of this evidence, because, as shown below, trial counsel was unconstitutionally

impeded from presenting it. Nor was the jury able to give effect to the mitigating evidence it did hear, which painted a picture of a complex, flawed individual as opposed to the vicious criminal depicted by the State. The jury heard evidence that Petitioner had a troubled childhood, was subject to racial tensions and violence in the Oklahoma City schools in the early 1970s, and left home at an early age. (App. 331-40) In addition, several ministers testified that Mr. Richardson had come to a profound understanding of the Bible and Christian teachings and had shared that religious conviction with others by, among other things, assisting other prisoners with Biblical studies (App. 352-54; 363-65) Petitioner's religious devotion was further evidenced by his drawings, which often reflected religious symbols and ideas (App. 343-44) Petitioner's faith inspired him to help a young girl with serious medical problems and suicidal tendencies, sharing poetry, artwork, letters and phone calls. Other witnesses testified that their lives had been similarly enriched by reading Petitioner's poetry and viewing his inspirational artwork. (App. 343-44; 347-48; 366-68)

Despite trial counsel's request for precisely the kind of mitigation instructions later required by *Penry I*, the jury retired with only the same three special issues which *Penry I* held insufficient to permit a jury to give mitigating effect to such evidence. Moreover, the jury never heard the compelling evidence of childhood abuse, because trial counsel — as he himself testified on state habeas (App. 379-87) — was stymied by the State's announced plan to call the notorious Dr. James Grigson as a witness. From experience, trial counsel knew two things: (1) that any evidence he put forth about childhood abuse would be argued by the prosecution as supporting Dr. Grigson's one-size-fits-all diagnosis of anti-social personality disorder; and (2) that there would be no *Penry*-type instruction telling the jury it could give independent *mitigating* effect to such evidence. As a

result, trial counsel was chilled from developing that evidence and Petitioner was sentenced to die by a jury that heard nothing about his childhood abuse, and was also never told how it could give mitigating effect to the evidence it did hear.

Two remands by this Court during direct appeal, and the fractured decisions of the courts since then, demonstrate that a jury presented with a full picture of Petitioner's background and character may well have spared his life. Petitioner's initial direct appeal produced three dissents on the CCA. *See Richardson* v. *State*, 744 S.W.2d 65, 85-86 (Tex. Crim. App. 1987) (en banc). When this Court remanded the case to the CCA for reconsideration in light of *Penry I, see Richardson* v. *Texas*, 492 U.S. 914 (1989), Petitioner asserted each of the points raised in this Petition, but the Texas court re-affirmed the death sentence, again over two dissents. *See Richardson* v. *State*, 886 S.W.2d 769, 777-79 (Tex. Crim. App. 1991) (en banc). The dissenting judges wrote that the "majority has not assimilated the basic holding in *Penry* that a capital jury must be empowered to effectuate any evidence that has mitigating potential that cannot be *fully* accommodated within the jury's response to [the] special issues." 886 S.W.2d at 777 (Clinton, J., dissenting) (emphasis in original). Two years later, still on direct appeal, this Court again remanded this case to the CCA for reconsideration in light of *Johnson* v. *Texas*, 509 U.S. 350 (1993), *Richardson* v. *Texas*, 509 U.S. 917 (1993), but the Texas court again affirmed. *Richardson* v. *State*, 901 S.W.2d 941 (Tex. Crim. App. 1994) (en banc). The dissenting judge succinctly highlighted the majority's failure to follow *Penry I*, noting that Richardson had "presented at least marginally colorable evidence of a disadvantaged background," which had "no mitigating significance within the scope of the statutory special issues," and thus required a separate *Penry*-type instruction. 901 S.W.2d at 942 (Clinton, J., dissenting).

Moreover, on both remands, the CCA refused to consider the main argument presented here — that Petitioner's trial counsel had been unconstitutionally deterred by the lack of a *Penry*-type instruction from developing the child abuse evidence. Petitioner filed a third petition for *certiorari* to the CCA, which this Court denied on June 26, 1995. *Richardson* v. *Texas*, 515 U.S. 1162 (1995).

On collateral review, both the state habeas courts and the lower federal courts again misapplied *Penry I*, as they did in *Penry II*. On Petitioner's timely petition for a writ of *habeas corpus*, the Bexar County District Court held a five-day evidentiary hearing, at which it heard *both* the compelling evidence of child abuse *and* how trial counsel had been chilled from presenting it. But the court denied habeas relief on October 1, 1997 (App. 445-79), as did the CCA on June 10, 1998 over two dissents. (App. 289-95) On September 8, 1998, Petitioner filed a timely petition with this Court for a writ of *certiorari*, which was denied on November 30, 1998. *Richardson* v. *Texas*, 525 U.S. 1021 (1998).

On October 8, 1998, Mr. Richardson filed his first federal petition for a writ of *habeas corpus* in the District Court for the Western District of Texas. On March 28, 2000, District Judge Biery issued a 158-page opinion denying relief and a Certificate of Appealability. (App. 17-186) Petitioner's timely motion to alter and amend judgment was denied on April 16, 2000. (App. 13-16) On August 23, 2000, Petitioner filed an Application for a Certificate of Appealability in the United States Court of Appeals for the Fifth Circuit, which was denied on January 23, 2001. *See Richardson* v. *Johnson*,

No. 00-50418, 2001 U.S. App. LEXIS 1621 (5th Cir. Jan. 23, 2001). (App. 1-12)[1]

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[1] In addition to the *Penry* issue, Petitioner also asserts misapplication of this Court's decision in *Gray* v. *Mississippi*, 481 U.S. 648 (1987). As we show below (pp. 20-28), the decision of the CCA on appeal and of the Fifth Circuit on federal habeas opened a gaping loophole in the *Gray* v. *Mississippi* rule that the erroneous exclusion of *Witherspoon*-qualified jurors can never be harmless error, by permitting harmless-error analysis to excuse the erroneous exclusion of such jurors on some other pretext not relating to the juror's *Witherspoon* qualifications.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH *PENRY I*

The Fifth Circuit, as well as the District Court and the state habeas courts, violated the constitutional principle of *Penry I* because Richardson's trial counsel, expecting the testimony of Dr. Grigson and knowing he would not get an instruction telling the jury how to address mitigating factors, was effectively precluded from developing available evidence of childhood physical and sexual abuse. For these reasons, the Fifth Circuit decided the question "in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c) — *i.e.*, it improperly applied *Penry I* in this case, much as it did in *Penry II*.

This Court held in *Penry I* that Texas juries must be separately instructed that they can consider and give effect to any mitigating evidence about the defendant's "background *or* character *or* the circumstances of the crime" that is *either* (1) "*not* relevant to the special verdict questions" or (2) has "relevance to the defendant's moral culpability *beyond the scope* of the special verdict questions." *Penry*, 492 U.S. at 321 (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring) (emphasis added)). The Court held that Penry's mitigating evidence of mental retardation and childhood abuse was relevant to the first special issue (deliberateness), but that "it *also* 'had relevance to [his] moral culpability beyond the scope of the special verdict questio[n].'" *Id.* at 322 (quoting *Franklin*, 487 U.S. at 185 (alternation in original) (emphasis added)). Moreover, such evidence was a "two-edged sword," because it was relevant to the second special issue ("future dangerousness") "only as an aggravating factor," suggesting a likelihood of future violent acts, while at the same time serving to "diminish his

blameworthiness for his crime." *Id.* at 323-34 (emphasis omitted). For both of these reasons, this Court concluded that a separate instruction was necessary in order to "provide a vehicle for the jury to give mitigating effect" to that evidence. *Id.* at 324, 328.

Unlike *Graham* v. *Collins*, 506 U.S. 461 (1993) and *Johnson* v. *Texas*, 509 U.S. 350 (1993), in which this Court distinguished *Penry*, the critical mitigating evidence in this case — a disadvantaged background, including child abuse — falls squarely within the *Penry I* rule. *See Graham*, 506 U.S. at 474 ("it was impossible to give meaningful mitigating effect to Penry's evidence by way of answering the special issues"). As recognized by Judge Clinton of the CCA in dissenting on the second remand, Petitioner's "evidence of a disadvantaged background . . . has no mitigating significance within the scope of the statutory special issues. Thus, the holding of *Johnson* is not implicated." *Richardson* v. *State*, 901 S.W.2d 941, 943 (1994) (Clinton, J., dissenting). Moreover, the effects of child abuse, unlike the evidence of youth at issue in *Johnson* and *Graham*, are not "transient," and are thus beyond the reach of the special issues. As the *Johnson* Court noted, "*Penry* remains the law and must be given a fair reading." *Johnson*, 509 U.S. at 369. As demonstrated below, such a "fair reading" of *Penry I* mandates a reversal here.[2]

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[2] The plurality opinion in *Jurek* v. *Texas*, 428 U.S. 262 (1976), does not change the result here. As a majority at this Court stated in *Penry I*, in *Jurek*, "both the concurrence and the dissent understood *Jurek* as resting fundamentally on the express assurance that the special issues would permit the jury to fully consider the mitigating evidence a defendant introduced" in answering the special issues. *Penry I*, 492 U.S. at 321. "Moreover, both the concurrence and the dissent stressed that 'the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was

A. The Unconstitutional Constraints Placed on Trial Counsel

This Court is by now quite familiar with the three special questions contained in the Texas statute in effect at Petitioner's trial. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981) (App. 296-97). In most cases, the ability of a jury to give effect to mitigating evidence was limited by the scope of the first two questions to the deliberate nature of the crime and to future dangerousness. Richardson's trial counsel, well aware of these limitations, proposed *five separate mitigation instructions* of the type later endorsed in *Penry I* (App. 301-10), but — as trial counsel fully expected (App. 382) — the trial court rejected them and merely told the jury that it could consider all of the evidence presented. (App. 314-16)

Trial counsel knew not only that he would not get a supplemental instruction, but also that the notorious Dr. James Grigson would testify for the State. (App. 384) As trial counsel testified at the state habeas hearing, Dr. Grigson

> was very well known to the defense bar in Texas at that time. He testified in many capital murder cases, invariably for the prosecution. He was a particularly effective witness for the State . . . [who] would invariably testify that he diagnosed the individual as having what is known as antisocial personality conduct disorder. He would go on to testify that that

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also permitted to give effect to its considerations in imposing sentence". *Id.* (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring)). The "express assurance" of *Jurek* was not fulfilled here because the jury was not able to "consider and weigh mitigating evidence."

> was an incurable condition . . . in other words, testimony in support of the future dangerousness question that was being submitted to the jury. (App. 384-85)

Trial counsel therefore knew that Dr. Grigson "would testify that child abuse was a predisposing factor, or one of the diagnostic criteria for antisocial personality conduct disorder," (App. 385) and, knowing there would be no instruction on how the jury could give that same evidence mitigating effect, he was "afraid that that type of evidence would only support Dr. Grigson's diagnosis. And for that reason, we didn't pursue that area." Had the court granted his request for a *Penry*-type instruction, trial counsel testified at the state habeas hearing, he would have approached the penalty phase differently and "would have been more conscious about developing evidence of child abuse and/or mental retardation." (App. 391)

B. The Mitigating Evidence Trial Counsel Was Chilled From Presenting

At the state habeas hearing, Richardson was finally able to present the powerful mitigating evidence that his trial counsel was clearly chilled from developing by the combination of the spectre of Dr. Grigson and the trial court's rejection of his requested *Penry*-type instructions. At the habeas hearing, Mr. Richardson's brother Julio testified that Mr. Richardson was subject to whippings and beatings by his father "at least twice a week or more," with a two-by-four, a rubber garden hose, a hose used for pumping oil or gas, a razor strap — or sometimes "he would just cut a switch off a tree." According to Julio, the injuries inflicted by his father were so severe that Mr. Richardson still has three "whelps on his behind" as a result of the beatings many years ago. And if the boy tried to escape these beatings, his father "tied him to a

clothesline pole." (App. 407-08) Julio also recalled that their father continually did things just to "scare" the children. (App. 409) For example, "he would like shoot his gun off or something to make [them] listen." And Julio recounted this incident in which their father stabbed Miguel — merely because he took a nap in the nude:

> [M]y dad don't like us to sleep without shirts on or underwear on or something. We couldn't sleep without, you know, something on. And one day Miguel was sleeping in the nude, you know. We had bunk beds. And my dad, I told my dad, I said, "Dad, Miguel is sleeping with no clothes on." So my dad went in there and started whipping on him. . . . My dad went and got a gun, a pistol. I think it was a .38, I don't know. It was a big round gun, like it was a revolver. He told him he was going take this whipping, or you're going to take this gun. And somewhere after that, I remember that Miguel just got stabbed. Well, at first what he did, he said, "You are going to act like a nigger on the street," he said, "I'm going to treat you like one." At that time, he pushed Miguel on the shoulder and put a knife on his neck like that. And he said, "Don't move, nigger." And then — and then — (pause) Miguel was sitting on the dresser with blood on the dresser.

(App. 410; *see also* App. 411) Julio also testified that his "father stabbed [Petitioner] one time in the behind with probably a six-inch knife, maybe a half or maybe a fourth of it." (App. 407)

Often, abused children are able to find comfort in each other's arms, but instead Miguel was physically and sexually abused by his older siblings. Julio recounted a day when the two younger boys were taken separately into a bathroom by

their sister Lolita, under the pretense of giving them a bath, and forced "to suck on her private." (App. 415-16) Lolita's abuse of Miguel was physical as well as sexual. Julio testified that "Lolita didn't like him. She always hated him. And she used to slap him around, throw stuff at him. One time he put some hair grease all over my face, and she stomped on him about six or seven times until his nose started bleeding." (App. 416) In addition, Miguel's older brother, Petillio, "would slap him a lot" and "bust his mouth on the table, make his nose bleed several times." (App. 412)

It is immaterial to the issue presented here whether Julio Richardson's testimony, if presented to the trial jury, would have been believed or would have conclusively affected the sentencing decision. The point here is that Petitioner had a constitutional right for the jury to hear and consider that testimony, but his trial counsel was unconstitutionally deterred from developing and presenting it by his knowledge that, in the absence of his requested instruction, such evidence could only be used as an aggravating circumstance to support Dr. Grigson's opinion. As we now show, the combination of this "chilling effect" of the trial court's failure to give a *Penry*-type instruction *and* the jury's inability, in the absence of such an instruction, to give mitigating weight to the evidence it *did* hear, mandated reversal of Richardson's death sentence in light of *Penry I*. But the CCA on remand from this Court, as well as the state and federal courts on collateral review, simply misapplied *Penry I* in reaching the opposite result.

C. The Trial Court's Failure to Give a Mitigation Instruction Forced Trial Counsel to Withhold Compelling Mitigating Evidence

In *Lockett* v. *Ohio*, 438 U.S. 586 (1978), this Court held that a capital jury must be able to give "independent

mitigating weight" to all constitutionally relevant evidence about a defendant's "character or record" that was proffered "as a basis for a sentence less than death." 438 U.S. 604-05; *see also Franklin* v. *Lynaugh*, 487 U.S. 164, 184-85 (1988) (O'Connor, J., concurring) ("it is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty"); *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982).

Applying the *Lockett* principle in *Penry I*, this Court held that the three special issues were constitutionally deficient when they prevented the jury from giving *full* effect to mitigating evidence before it such as retardation and child abuse. But a capital defendant's rights, under *Lockett* and *Eddings*, to have the jury consider and give mitigating effect to such evidence, are violated every bit as much when, as here, the limited scope of the special questions deterred trial counsel from ever developing such evidence. As Justice O'Connor stated in *Franklin*, "the principle underlying *Lockett, Eddings,* and *Hitchcock* [v. *Dugger*, 481 U.S. 393 (1987)] is that punishment should be directly related to the personal culpability of the criminal defendant." 487 U.S. at 184. And, as was stated in *California* v. *Brown*:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse . . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime. . . .

479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis omitted).

Absent a complete picture of the defendant's background and character, a capital jury cannot express such a "reasoned moral response." Here, the jury never got that complete picture, because trial counsel was unconstitutionally inhibited from painting it.

In concurring in the 1991 judgment of the CCA on the remand by this Court, Judge Benavides recognized that: "[w]hen a child has been abused by his parents or by some other person in a position of trust or obligation toward him, he may have a greater tendency than normally reared children to develop an impaired conscience." 886 S.W.2d at 777 (Benavides, J., concurring). Thus, Judge Benavides correctly recognized that if there were "sufficient evidence to raise the issue that [Petitioner's] conscience was impaired because he was abused or betrayed as a child, and might therefore be somewhat less culpable for his criminal behavior as an adult," *Penry I* would have mandated "a jury instruction of the kind requested, or its functional equivalent." *Id.* Petitioner produced just such "sufficient evidence" at the state habeas hearing. Only the Texas courts' universal pre-*Penry* practice of refusing to give the very instruction later mandated in *Penry I* prevented trial counsel from developing and presenting that same evidence at trial.

The Fifth Circuit — echoing the district court's misconception of Petitioner's *Penry* claim — denied the claim "because Mr. Richardson cites no precedent stating that a trial judge erred by not giving a *Penry*-type instruction where there was nothing about which to instruct." (App. 9) However, Petitioner has never argued that a *Penry* instruction should have been given in the absence of mitigating evidence. As detailed above, he has consistently asserted that there

would have been compelling evidence of child abuse, but for the trial court's refusal to give a *Penry*-type instruction, which forced trial counsel to eschew developing that evidence.

The unconstitutional deterrence, or chilling, of trial counsel's ability to present relevant evidence is hardly a new concept. In the past, this Court has invalidated state statutes that placed limits on the mitigating evidence defense counsel could present. *See Hitchcock* v. *Dugger*, 481 U.S. 393 (1987). Relying on those decisions, the Supreme Courts of Florida and Arizona reversed death sentences where defense counsel had been effectively inhibited from presenting mitigating evidence because of the unconstitutional restrictions contained in state statutes. *Hall* v. *State*, 541 So. 2d 1125 (Fla. 1989) (per curiam); *State* v. *Evans*, 584 P.2d 1149 (Ariz. 1978) (in banc). In *Hall*, the Supreme Court of Florida ordered a new trial in light of this Court's decision in *Hitchcock*, because the "trial court limited the jury's and its own consideration to the statutorily enumerated mitigating circumstances." 541 So. 2d at 1126. Similarly, in *Evans*, defense counsel "did not attempt to present mitigating factors at the sentencing hearing" because at the time of the trial, Arizona had a statute that limited presentation of mitigating factors. 584 P.2d at 1153. Because counsel was "relying on the limitations on mitigating factors imposed" by the statute, the Arizona Supreme Court ordered a new trial so that defense counsel would not labor under restrictions on his ability to present mitigating evidence. *Id.*[3]

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[3] Moreover, even the CCA itself recognized, in *dicta*, that a claim that the pre-*Penry* Texas sentencing scheme unconstitutionally "chilled" the presentation of two-edged evidence "might be appropriate in a pre-*Penry* case." *Satterwhite* v. *State*, 858 S.W.2d 412, 428 (Tex. Crim. App. 1993) (en banc).

Each of these decisions recognized that where the law at the time of a defendant's trial puts restraints on his counsel's ability to present mitigating evidence, and such restraints are later invalidated by this Court, the defendant must be given a new trial free of such restraints. In failing to recognize that a new trial is likewise necessitated here by this Court's decision in *Penry I*, the decisions of the Fifth Circuit, the District Court, and the state habeas courts, are in conflict with *Hall* and *Evans*. In sum, this case presents a unique opportunity for this Court to decide the "*Penry*-chilling" issue on the full evidentiary record developed at Petitioner's state habeas hearing.[4]

D. The Mitigating Evidence Presented at Trial Was Beyond the Scope of the Special Issues

Petitioner's *Penry I* issue before this Court is not, of course, confined to the chilling argument. The mitigating evidence actually presented at trial fell outside the scope of the special issues or was "two-edged." The first question the jury answered related to the deliberateness of Mr. Richardson's conduct. As this Court explained in *Penry I*, this first special issue did not provide a vehicle for a capital jury to give effect to the type of mitigating evidence presented by Petitioner. The evidence at trial, of a troubled childhood, racial violence in school, religious devotion and kindness to others, "had relevance to [his] moral culpability

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[4] It is thus distinguishable from several lower court decisions rejecting the "*Penry*-chilling" argument in which this Court denied *certiorari*, where no such record had been developed of the actual evidence trial counsel had been chilled from presenting. *See, e.g., West* v. *Johnson*, 92 F.3d 1385, 1405 (5th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997); *Briddle* v. *Scott*, 63 F.3d 364, 370 (5th Cir. 1995), *cert. denied*, 516 U.S. 1033 (1995); *Allridge* v. *Scott*, 41 F.3d 213, 223 (5th Cir. 1994), *cert. denied*, 514 U.S.1108 (1995).

beyond the scope of the [first] special verdict questio[n]." 492 U.S. at 321. Indeed, the evidence demonstrating Mr. Richardson's religious devotion and ability to contribute to society while in prison had absolutely no bearing on the issue of whether his conduct at the time of the crime was deliberate.

Much of the mitigating evidence which the jury heard was also irrelevant, or at least "two-edged," with regard to the second special issue on future dangerousness. On the two remands from this Court, the CCA issued contradictory opinions on whether evidence of Petitioner's artistic and poetic talent could be "shoehorned" into the second special issue.[5] The truth is, as Judge Clinton noted in dissent on the second remand (901 S.W.2d at 943), that "artistic and poetic talent has [no] relevance whatsoever, aggravating or mitigating, to the issue of future dangerousness." And while the evidence of Petitioner's troubled childhood, and the racial violence he encountered in school, could be mitigating, it was "two-edged," because it could *also* have led the jury to conclude he would be violence-prone in the future. For these reasons, on the evidence that was already in the record, *Penry I* required that Petitioner be given a new trial at which the jury was given a *Penry*-type instruction.

On each of the remands to the CCA, and in state and federal habeas, the courts applied — as they did in the *Penry* case itself — what CCA Judge Clinton properly called a

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[5] The majority had held on the first remand that it could not "shoehorn appellant's artistic and poetic abilities into the ambit of the second special issue" 886 S.W.2d at 773. However, as Judge Clinton observed in his dissent on the second remand, the CCA turned completely around on the second remand, holding that "the jury could have used this evidence to answer 'no' to special issue two." 901 S.W.2d at 943.

"crabbed interpretation" of this Court's *Penry I* decision. As Judge Clinton wrote on the first remand in 1994:

> [T]he majority tacitly assumes throughout that as long as it can identify some sense in which that evidence might be said to militate in favor of a 'no' answer to one of the special issues, then it is not confronted with what it calls "*Penry* evidence." This assumption misses the very essence of the Supreme Court's holding. It may well be that the jury "had the opportunity to give effect "to a particular item of mitigating evidence within the parameters of the special issues. But should that evidence also have some potentially mitigating aspect not accountable under the special issues, we cannot say that special issues enable the jury to give it *full* consideration and effect. The jury must be empowered to give mitigating evidence all the effect to which it is susceptible before we can say the Eighth Amendment has been satisfied, consonant with the holding in *Penry*.

886 S.W.2d at 778 (internal citation and footnotes omitted).

E. Neither *Teague* Nor the AEDPA Bars Petitioner's Claim

Under *Teague* v. *Lane*, 489 U.S. 288, 301 (1989), "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government." 489 U.S. at 301. A case does "not announce a new rule" when it is "merely an application of [a] principle that governed" an earlier decision. *Id.* at 307 (citation omitted). The *Penry I* Court specifically held that it was not announcing a new rule for purposes of *Teague*, but rather, the result there was "dictated by *Eddings* and *Lockett*." *Penry I*, 492 U.S. at 319. The AEDPA requires reversal where the

decision of a state court "was either (1) 'contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams* v. *Taylor*, 529 U.S. 362, 404-405 (2000) (emphasis omitted) (quoting 28 U.S.C.A. § 2254(d)(1)). The "contrary to" and the "unreasonable application" clauses of the AEDPA are independent. In *Williams*, Justice O'Connor explained that "contrary to" means that "the state court's decision must be substantially different from the relevant precedent of this Court." *Williams*, 529 U.S. at 405. "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Id.*

In this case, *Teague* and AEDPA questions are in substance the same: Does the rule of *Penry I*, a rule not new at the time, but compelled by *Lockett* and *Eddings*, control the result here? The answer is yes. As demonstrated above, the result Petitioner seeks here follows inexorably from the *Lockett-Eddings-Penry* line of cases. Therefore, the rule Petitioner asks this Court to apply is not "new" for *Teague* purposes, and is not barred by AEDPA because the decisions of the CCA and Texas habeas courts were contrary to, or an unreasonable application of, federal law as established by those decisions of this Court.

II. THIS COURT'S RULING IN *GRAY* v. *MISSISSIPPI* IS EVISCERATED BY THE CCA'S HARMLESS-ERROR AFFIRMANCE OF THE ERRONEOUS EXCUSAL OF A *WITHERSPOON*-QUALIFIED JUROR

Petitioner's second claim presents an important federal issue respecting a capital defendant's fundamental

constitutional right to retain jurors whose doubts about capital punishment passed muster under this Court's decision in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). That rule was designed to assure an impartial jury not "organized to return a verdict of death." *See Witherspoon*, 391 U.S. at 521. On direct appeal, the CCA violated this fundamental right by applying harmless error analysis — in flagrant disregard of *Gray* v. *Mississippi*, 481 U.S. 648 (1987) — to an admittedly erroneous exclusion of a *Witherspoon*-qualified juror on grounds not relating to the juror's *Witherspoon* qualifications. Each subsequent court to review this case has likewise disregarded *Gray*. Review by this Court is warranted because the Fifth Circuit's ruling opened a gaping loophole in this Court's *Gray* decision, and decided this issue contrary to the Florida Supreme Court's decision in *Farina* v. *State*, 680 So. 2d 392 (Fla. 1996), and prior Fifth Circuit law.

A. The Voir Dire

During *voir dire*, prospective juror William Noble stated that he was opposed to the death penalty, but despite those feelings, he could vote to impose a death sentence based on the law and evidence presented at trial. The State then challenged Mr. Noble for cause but, after further questioning by the court, Mr. Noble stated that he would be able to follow his oath and apply the law to the facts presented at trial. The trial court therefore properly overruled the challenge on the basis of *Witherspoon*.

The state continued examining Mr. Noble, who stated that he had "already prejudged the case" based on what he had read in the newspapers. (App. 326) The trial court asked Mr. Noble whether he had formed an opinion as to guilt or innocence. Upon Noble's affirmative answer, the court *sua sponte* excused him without asking whether that opinion would influence his verdict, as required by the Texas statute.

TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(10) (Vernon 1966). Thus, the predicate for excusal under Texas law was not laid, and the exclusion of Mr. Noble was clear error. The defendant objected but the trial court overruled the objection.

On Petitioner's original direct appeal in 1987, the CCA agreed that exclusion of Mr. Noble constituted clear error under the Texas statute, but, *over three dissents*, held that the error was harmless because "the trial judge excused the venireman *sua sponte* rather than as the result of a challenge for cause by the State, thus depriving the State of the orderly opportunity to challenge peremptorily." 744 S.W.2d at 71. The Texas court neither cited nor considered this Court's decision in *Gray* v. *Mississippi*, decided five months earlier, which rejected harmless-error analysis for exclusion of *Witherspoon*-qualified jurors.

Mr. Richardson also raised this issue in his state and federal habeas petitions. The Texas habeas court failed to consider this issue in light of *Gray*; without addressing the merits, it denied the claim on the erroneous ground that it "was raised and decided adversely to Richardson on direct appeal" and therefore, "[could not] form the basis for relief in a post-conviction writ of habeas corpus." (App. 447)

On federal habeas, the district court and the Fifth Circuit below also failed to consider the *Gray* issue on the merits. The Fifth Circuit completely misapprehended Petitioner's argument in ruling that *Witherspoon* and *Gray* do not apply to this case because "[c]ontrary to Mr. Richardson's assertion that Noble was excused because he opposed the death penalty in violation of *Witherspoon*, Noble was in fact excused *sua sponte* by the trial court during *voir dire* because the court believed that he had already prejudged the case."

(App. 5-6)[6] But Petitioner has never asserted that Mr. Noble was excused based on his views about the death penalty; his argument has always been that the federal constitutional error here was in the *appellate* ruling that the trial court's admittedly erroneous exclusion of a *Witherspoon*-qualified juror on *different* grounds was harmless error.

B. The Erroneous Disqualification of a *Witherspoon*-Qualified Juror Could Not Be Harmless

In *Witherspoon*, this Court held that the Sixth Amendment right to an impartial jury forbids exclusion for cause of jurors opposed to the death penalty who confirm that such beliefs would not prevent or impair performance of their duties in accordance with their instructions. The importance of this ruling was made evident in this Court's subsequent decision in *Gray* — decided while Mr. Richardson's direct appeal was pending before the CCA. *Gray* held that the improper exclusion of a prospective juror under the *Witherspoon* rule can never be upheld as harmless error. *Gray*, 481 U.S. at 666-69. As the Court explained in *Gray*:

> Because the *Witherspoon-Witt*[7] standard is rooted in the constitutional right to an impartial jury, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* [v. *California*, 386 U.S. 18 (1967)] harmless-error analysis cannot apply. We have recognized that

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[6] The district court had likewise characterized Petitioner's argument as being erroneously premised on an assumption that the trial court excluded Mr. Noble *because of his views on the death penalty* (App. 94) and on that incorrect basis, ruled that "the holding in *Gray* v. *Mississippi* is inapposite to this cause." (App. 98)

[7] *Wainwright* v. *Witt*, 496 U.S. 412 (1985).

> "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." The right to an impartial adjudicator, be it judge or jury, is such a right. As was stated in *Witherspoon*, a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.'"

Id. at 668 (internal citations omitted).

The *Gray* holding was not new: it reaffirmed this Court's 1976 *per curiam* ruling in *Davis* v. *Georgia*, 429 U.S. 122 (1976) (per curiam), which "established a *per se* rule requiring vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause." *Gray*, 481 U.S. at 659, *citing Davis*, 429 U.S. at 123-124 (dissenting opinion).

In failing to even consider *Gray*, the Fifth Circuit violated Mr. Richardson's fundamental rights. The *Witherspoon* rule, given added force in *Gray*, ensures that a capital defendant is not sentenced by a jury predisposed to return a verdict of death, by requiring that jurors personally opposed to the death penalty may serve so long as they confirm their ability to perform their duties in accordance with the law. Because this right is "so basic to a fair trial," this Court held in *Gray*, the improper exclusion of a *Witherspoon*-qualified juror can *never* be upheld as harmless error. *Gray*, 481 U.S. at 668 (citation omitted).

But, if a *Witherspoon*-qualified juror can simply be excused on some other, admittedly erroneous ground — as Noble was here — and that excusal can then be upheld as

harmless error, there is nothing left of the *Gray* protection. Every time a venire person passes muster under *Witherspoon*, the prosecution need only find a different, although wholly erroneous, pretext for challenging that juror, secure in the knowledge that the error will be upheld as harmless. The wrongful exclusion of a *Witherspoon*-qualified juror by such a stratagem is every bit as prejudicial to a capital defendant's right to an impartial jury as if the *Witherspoon* challenge minutes before had been granted. Indeed, failure to apply *Gray* to facts such as these renders the rule of that case meaningless.

C. The Fifth Circuit's Holding Directly Conflicts With Decisions of this Court, the Florida Supreme Court and the Fifth Circuit Itself

The Fifth Circuit, erroneously believing that Petitioner's argument was based on the trial court's ruling, rather than the CCA's harmless error holding, concluded that "reasonable jurists would not find the district court's assessment of the alleged *Witherspoon* claim debatable or wrong." (App. 6) But "reasonable jurists" *have* found the harmless error analysis applied in the CCA's opinion to be debatable and wrong. The harmless error reasoning of the CCA, upheld by the Fifth Circuit here, was *expressly rejected* by this Court in *Gray*. *See Gray*, 481 U.S. at 664-66. *See also Bernette* v. *Illinois*, 403 U.S. 947 (1971), and decision below, 258 N.E.2d 793 (Ill. 1970); *Wigglesworth* v. *Ohio*, 403 U.S. 947 (1971), and decision below, 248 N.E.2d 607 (Ohio 1969). In addition, both the Fifth Circuit and the CCA itself, sitting *en banc*, had previously rejected the "unexercised peremptory" argument in death cases, because such a ruling effectively permits the retroactive exercise of preemptory challenges. *See Moore* v. *Estelle*, 670 F.2d 56, 57 (5th Cir. 1982); *Grijalva* v. *State*, 614 S.W.2d 420, 424-25 (Tex. Crim. App. 1980) (*en banc*). And, in this very case, three justices of

the CCA dissented *on this very point*. *See Richardson*, 744 S.W.2d at 85-86.[8]

Although the state and federal courts never reached the essence of Petitioner's *Gray*'s argument, prior decisions of the Supreme Court of Florida, and of the Fifth Circuit itself, have read the *Gray* rule against harmless-error analysis as not limited to the disqualification of a *Witherspoon*-qualified juror under *Witherspoon* itself.

In *Farina* v. *State*, 680 So. 2d 392 (Fla. 1996), the Florida Supreme Court vacated a death sentence on the strength of *Gray* v. *Mississippi*. In *Farina*, a venireperson named Hudson had been interrogated extensively about her reservations towards the death penalty and eventually passed muster under *Witherspoon*, indicating that she would give the imposition of the death penalty "a fair shake." *Id.* at 397. Later, the trial court disqualified Mrs. Hudson for cause without either the prosecution or the trial judge giving a clear

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[8] The CCA majority nevertheless held that *Grijalva* did not apply here, because the trial court acted *sua sponte* and there was, therefore, no need to "penalize" the state for gaining an unfair advantage. *Richardson*, 744 S.W.2d at 70-71. But, as this Court made clear in *Gray*, rejection of harmless error analysis in capital cases has nothing to do with the need to "penalize" prosecutors for asserting groundless challenges. Rather, "the relevant inquiry is 'whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error,'" *Gray*, 481 U.S. at 665, *quoting Moore* 670 F.2d at 58 (emphasis in original). *See* 744 S.W.2d at 85-86 ("In *Grijalva*, no less than in the instant case, opportunity for the orderly conduct of peremptory challenges by both sides was preempted by erroneous excusal of the venireman by the trial court. That here that excusal was *sua sponte* does not invalidate the rationale of *Grijalva*. . . . Circumvention of the statutorily mandated order for the exercise of peremptory challenges in a capital case is just as manifest here as it was in *Grijalva*.") (Clinton, J., dissenting) (emphasis omitted).

explanation for why a for-cause challenge should be granted. In fact, the trial court merely indicated that it was doing so because it had just granted a defense challenge. *Id.* at 398. The Florida Supreme Court found that to be clear error and held that, because Hudson had passed muster under "the *Witherspoon-Witt* standard," *Gray* v. *Mississippi* dictated that "the erroneous exclusion of Hudson is *not subject to harmless error analysis,*" and accordingly, vacated the death sentence. *Id.* at 398-99 (emphasis added).

Similarly, in *Ellis* v. *Lynaugh*, 873 F.2d 830, 837 n.1 (5th Cir. 1989), the Fifth Circuit itself recognized that *Gray's* ban on harmless error analysis is not limited to the erroneous removal of a *Witherspoon*-qualified juror under *Witherspoon* itself. The precise issue in *Ellis* was whether the trial court's *questioning* of the prospective juror on his ability to follow his oath was improper conduct. 873 F.2d at 833. The Fifth Circuit held that it was not, but added in a footnote *citing Gray*, that "[w]ere we to conclude that the trial court engaged in impermissible conduct, *we would not be able to conclude*, as did the district court, *that such was harmless error*." *Id.* at 836, n.1 (emphasis added).[9]

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[9] It is of course true that, in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), this Court declined "to extend the rule of" *Gray* to embrace a trial court's erroneous *failure* to excuse a juror who was clearly *not* qualified under *Witherspoon*. But the Court's rationale shows why, as discussed above, the *Gray* ruling *does* apply when a juror who was qualified to serve under *Witherspoon* has been erroneously *excluded* on other grounds. Here, as in *Gray* (but not *Ross*), there is "the inability to know to a certainty whether the prosecution could and would have used a peremptory challenge to remove the erroneously excused juror." *Ross*, 487 U.S. at 88 (citing *Gray*, 481 U.S. at 665). Thus, Mr. Richardson, unlike Ross, was clearly denied his constitutional right to an impartial jury not "organized to return a verdict of death." *Gray*, 481 U.S. at 668 (quoting *Witherspoon*, 391 U.S. at 521).

D. Neither *Teague* Nor the AEDPA Forecloses the *Gray* Claim

The *Gray* claim is not barred by the *Teague* doctrine. For purposes of *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U.S. at 301. As this Court explained, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* A case does "not announce a new rule" when it is "merely an application of [a] principle that governed" an earlier decision. *Teague*, 489 US. at 307 (citation omitted). As explained *supra* (p. 24), this Court in *Gray* made clear that its decision merely reaffirmed its prior holding in *Davis* v. *Georgia*.

Petitioner's claim that the erroneous exclusion of a *Witherspoon*-qualified juror on other grounds can never be harmless error is a direct application of this Court's decisions in *Gray* and *Davis*. Indeed, the entire argument is that, if harmless error analysis can uphold the erroneous excusal of a *Witherspoon*-qualified juror in a case like this, the gaping loophole thus opened would swallow up the *Gray* rule completely. Therefore, this case is not barred by the retroactivity doctrine of *Teague*.

By the same token, the *Gray* claim survives scrutiny under the AEDPA, because the Fifth Circuit's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by this Court in both *Gray* and *Davis*. 28 U.S.C. § 2245(d)(1).

III. CONCLUSION

Petitioner respectfully requests that this Court issue a writ of certiorari and reverse the judgment of the Fifth Circuit or, alternatively, issue a writ of certiorari to review the judgment below on both issues herein presented.

Dated: April 20, 2001

Respectfully submitted,

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No. (2)
Supreme Court, U.S.
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MIGUEL RICHARDSON,
Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME I, PAGES 1-295

THIS IS A CAPITAL CASE

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2001 U.S. APP. LEXIS 1621 printed in FULL format.

Richardson v. Johnson

00-50418

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2001 U.S. App. LEXIS 1621

January 23, 2001, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: United States District Court for the Western District of Texas.

5:98-CV-775.

OPINION: Affirmed

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50418

MIGUEL A. RICHARDSON,

Petitioner-Appellant,

versus

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT
OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(5:98-CV-775)

Before HIGGINBOTHAM, DeMOSS, and STEWART,
Circuit Judges.

CARL E. STEWART, Circuit Judge:*[1]

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[1] Pursuant to 5TH *CIR.* R. 47.5, the court has determined that this opinion should not be published and is not

Petitioner, Miguel Richardson ("Richardson"), appeals the district court's denial of a certificate of appealability ("COA"). Because we find that the district court did not err in denying the COA, we affirm the ruling and vacate the stay of execution.

FACTUAL & PROCEDURAL HISTORY

On September 18, 1981, Richardson was convicted of capital murder under Texas Penal Code Ann. § 19.03 and sentenced to death for the March 31, 1979, murder of John G. Ebbert, a security guard at a Holiday Inn in San Antonio, Texas. During voir dire, the state trial court excused *sua sponte* a prospective juror, William Noble ("Noble"), who stated that he had already prejudged the case and that he was opposed to the death penalty. At the penalty phase of Richardson's trial, Dr. Robert Rast, an expert witness and psychiatrist for the State, testified that although he had not examined Richardson, Richardson was a "threat to society" and a "psychopath." The State notified Dr. Rast that it would call him as a witness one day before he gave his testimony, and it promptly notified Richardson regarding the proposed testimony.

On June 1, 1994, the Texas Court of Criminal Appeals ("CCA") affirmed Richardson's conviction and death sentence, and it denied Richardson's motion for rehearing on September 21, 1994. Richardson filed a petition for a writ of habeas corpus in the 175th District Court of Bexar County. That court conducted a four-day evidentiary hearing on

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precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

April 29 through May 2, 1997, in which Richardson presented evidence of a childhood history of sexual and physical abuse and evidence regarding the absence of written guidelines and protocols regulating lethal injections in Texas. Richardson's petition, however, was denied.

On October 8, 1998, Richardson filed a petition for COA in federal district court. The district court denied relief on March 28, 2000. Richardson filed a Motion to Alter and Amend the Judgment of the District Court on April 11, 2000, which was denied on April 16, 2000. Richardson now appeals.

DISCUSSION

This Court may not issue a COA "unless the State court's adjudication of the claim resulted in 'a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court . . . ; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Knox v. Johnson, No. 99-41068, slip op. at 5280 (5th Cir. filed August 21, 2000) (citing 28 U.S.C. § 2254(d)).

The Supreme Court recently announced in Slack v. McDaniel somewhat different standards for the issuance of a COA under AEDPA. It noted that "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 120 S. Ct. 1595, 1603-04 (2000).

Moreover, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. In addition, this Court will defer to a state court's factual findings "unless they were 'based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.'" Knox v. Johnson, No. 99-41068, slip op. at 5280 (citing Chambers v. Johnson, 218 F.3d 360, 363 (5th Cir. 2000)).

I. Whether the trial court violated Richardson's Fifth and Sixth Amendment Rights by dismissing a venireperson

Richardson argues that the state trial court erred when it excluded Noble, whom Richardson argues qualifies under Witherspoon v. Illinois because he expressed opposition to the death penalty. 391 U.S. 510, 521-23 (1968). Richardson also argues that the CCA erred when it held that the trial court harmlessly erred when it excused Noble. The CCA determined that although the trial court asked Noble whether he had formed an opinion regarding Richardson's guilt or innocence, the trial court did not ask him whether that opinion would influence his verdict as required by Tex. Code Crim. Proc. 35.16(a)(10).

Contrary to Richardson's assertion that Noble was excused because he opposed the death penalty in violation of Witherspoon, Noble was in fact excused *sua sponte* by the trial court during voir dire because the court believed that he

had already prejudged the case. Moreover, although Richardson notes that a Witherspoon error may never be harmless error,[2] the CCA stated that Noble's dismissal was error because Texas law holds that a juror must be asked whether his conclusion will influence his verdict. Richardson v. State, 744 S.W.2d 65, 68 (Tex.Cr.App. 1987). The CCA's holding, therefore, regarding error had nothing to do with a Witherspoon violation.

The CCA, however, concluded that this error was harmless because Richardson had not shown that he was harmed by the trial court's action since the State had not used all of its peremptory challenges. Id. at 68-69. Thus, we affirm the trial court's ruling on this issue since reasonable jurists would not find the district court's assessment of the alleged Witherspoon claim debatable or wrong.

II. Whether Dr. Rast's testimony violated Richardson's Fifth and Sixth Amendment Rights

Richardson's main argument for this issue is that Gardner v. Florida, 430 U.S. 349 (1977), applies to this case and that Gray v. Netherland, 518 U.S. 152 (1996), is inapplicable.[3] Dr. Rast testified in part that Richardson was a

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[2] Richardson cites Gray v. Mississippi, 481 U.S. 648, 668 (1987).

[3] Richardson complains that the state trial court erred in permitting Dr. Rast, a "surprise witness," to testify, thereby depriving him of effective assistance of counsel and violating his due process rights. Upon review of the transcript of the evidentiary hearing conducted by the

"threat to society" and a "psychopath," yet he candidly admitted that he had not examined him. Richardson asserts that Gardner, in which the Court held that the trial court denied petitioner's due process rights because it sentenced him "to death on the basis of information which he had no opportunity to deny or explain," is controlling precedent.

Gardner is distinguishable from the instant case because the confidential portions of the presentence report remained undisclosed to all parties in that case. Moreover, the defense received no opportunity at trial to examine the confidential report. Here, however, although Richardson was not aware of Dr. Rast's testimony until the day before he testified, he was afforded a lengthy opportunity to cross-examine Dr. Rast.

More importantly, this case is governed by Gray v. Netherland which involved the testimony of two additional witnesses, a medical examiner and a police officer, regarding additional murders the Petitioner had allegedly committed. Like Richardson, the Petitioner in Gray v. Netherland received only a day's notice of the testimony, yet the Court noted that there is "no general constitutional right to discovery in a criminal case . . ." 518 U.S. at 168-171. It held that Petitioner's notice of evidence claim regarding the two witnesses was barred by Teague v. Lane, 489 U.S. 288 (1989), because it sought "retroactive application of a new rule." Id.

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court on this issue, we find no error and decline to elaborate further.

Richardson contends that Gray is inapplicable to his case because the evidence at issue involved "cumulative witnesses" instead of a witness who is the State's sole expert on future dangerousness. This argument is not persuasive given that the principle behind Gray and the instant case is the same: notice of evidence claims are Teague-barred. It matters little how many witnesses constitute the evidence. Moreover, although Richardson asserts that Gardner is applicable, the Court in Gray distinguished that case by noting that although "Gardner literally had no opportunity to even see the confidential information . . . [p]etitioner in the present case, on the other hand, had the opportunity to hear the testimony of Officer Slezak and Dr. Presswalla in open court, and to cross examine them." Gray, 518 U.S. at 168-69. Here, as in Gray, Richardson was afforded the opportunity of hearing the testimony of Dr. Rast and cross-examining him. The law is, therefore, clear that the district court did not err when it granted relief on this issue and reasonable jurists would not find the district court's assessment of this issue debatable or wrong.[4]

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[4] Richardson also argues that Estelle v. Smith 451 U.S. 454 (1981) and Gholson v. Estelle 675 F.3d 784 (56 Cir. 1982) are instructive. Although these cases involved the admission of testimony of "surprise witnesses," these witnesses were psychiatrists who had previously interviewed the defendants and who later testified about the future dangerousness of the defendants based on their examinations. In both cases, however, the courts focused on the lack of an attorney during the examination as the reason for their holdings. Here, there is no such issue, as Dr. Rast admitted that he had not interviewed Richardson.

III. Whether the trial court erred by not giving a Penry instruction even though mitigating evidence regarding childhood abuse was not presented

Although Richardson admits that he did not present mitigating evidence regarding childhood sexual and physical abuse at trial because of his fear that a Penry-type instruction would not be given, he argues that because he presented such evidence at the state habeas corpus hearing, this Court should hold that the district court erred by not giving such an instruction. The district court extensively examined this issue and found that Richardson's claim lacked merit.

We agree with the district court's assessment because Richardson cites no precedent stating that a trial judge erred by not giving a Penry-type instruction when there was nothing about which to instruct. See Boyd v. Johnson 167 F.3d 907, 912 (5th Cir. 1999) ("A petitioner cannot base a Penry claim on evidence that could have been but was not proffered at trial."); see also Woods v. Johnson, 75 F.3d 1017, 1033(5th Cir. 1996) ("We have consistently held that a Penry v. Lynaugh, 492 U.S. 302,109 S. Ct. 2934,106 L. Ed. 2d 256 (1989), claim may not be predicated on 'evidence' which was not offered or tendered (conditionally or otherwise) at trial."). Hence, the trial court did not err in denying a COA on this issue.

IV. Whether the lack of written guidelines and protocols for executions by lethal injection in Texas violates Richardson's Eighth Amendment rights

Richardson creatively argues that the lack of written guidelines and protocols to administer executions by lethal injection in Texas violates his Eighth Amendment rights against cruel and unusual punishment. Richardson presented the testimony of two experts, a criminologist and anesthesiologist/pharmacologist, at the state habeas corpus hearing. They testified regarding the effects of extreme pain and suffering as a result of lethal injection and specific instances which resulted in extreme pain and suffering involving lethal injection, respectively. However, as the district court points out, this Court has upheld the use of lethal injection as a method of execution. See Woolls v. McCotter, 798 F.2d 695, 697 (5th Cir. 1986); see also Kelly v. Lynaugh, 862 F.2d 1126, 1135 (5th Cir. 1988) (stating that this Court has already rejected the argument that lethal injection is cruel and unusual punishment even when administered by an unqualified person). Moreover, as the district court further notes, Richardson is in essence petitioning for the application of a new rule which is barred by Teague.

We also agree with the district court's assessment that the expert testimony given by Drs. Edward Brunner and Deborah Denno at the state habeas corpus hearing is not helpful on this issue. Although the district court emphasizes that the experts were unable to testify how lethal injections are administered in Texas, we agree with its finding that the experts failed to show how the lack of written procedures results in extreme pain and suffering.

For example, Dr. Denno, the criminologist, testified that there have been 11 botched executions out of 115 total executions in Texas by lethal injection. Dr. Denno admitted that seven out of these eleven botched executions resulted not because of a lack of written procedures, but because the officials took care to find a suitable vein on individuals who were long-time intravenous drug users and who had much vein-scarring. Accordingly, there are only four out of a total of 115 executions administered by lethal injection which may be deemed "botched" according to Dr. Denno. It is unclear whether these failed efforts occurred because of a lack of written procedures or because of human error. Richardson's evidence is insufficient to show that Texas violates individuals' Eighth Amendment rights because of a lack of written guidelines in administering executions by lethal injection.

Dr. Brunner was also unable to explain the link between written guidelines and decreased pain and suffering during lethal injection. In addition, he noted that there is nothing to indicate that Texas is doing anything incorrectly in administering lethal injection. Thus, the district court did not err by denying a COA for this issue.

CONCLUSION

Because we find that Richardson's Fifth and Sixth Amendment rights were not violated when the state trial court excused venireperson Noble and when Dr. Rast testified during the penalty phase of the trial, Richardson's Eighth Amendment rights were not violated by a lack of written guidelines and protocols for executions by lethal injection in Texas, and the state trial court did not err by not giving a

Penry instruction, we affirm the district court's denial of a COA and vacate the stay of execution.

AFFIRMED. STAY OF EXECUTION VACATED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MIGUEL A. RICHARDSON,	§	
Petitioner,	§	
v.	§	
GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,	§	**CIVIL NO. SA-988-CA-775-FB**
Respondent.	§	

ORDER DENYING MOTION TO ALTER AND AMEND JUDGMENT

The matter before the Court is petitioner's motion to alter or amend judgment filed April 11, 2000.[1]

In a detailed Memorandum Opinion and Order issued March 28, 2000, this Court explained at length why all of the petitioner's claims for relief in this federal habeas corpus are foreclosed by well-settled case law and, additionally, that most of his claims are also barred by the non-retroactivity doctrine of **Teague**, the doctrine of harmless error, or both.[2] This Court also denied petitioner a Certificate of

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[1] See docket entry no. 25.

[2] See docket entry no. 23.

Appealability ("CoA"), citing the multiple barriers to relief that existed with regard to each of his claims herein.

On April 11, 2000, petitioner filed a pleading styled "Memorandum of Law in Support of the Motion by Petitioner Miguel A. Richardson to Alter and Amend Judgment," in which petitioner argues that (1) this Court employed an unduly restricting standard in denying petitioner a CoA, (2) he is entitled to federal habeas relief because the Texas Court of Criminal Appeals erroneously applied the state law doctrine of harmless error in denying petitioner's pseudo-**Witherspoon** claim,[3] and (3) petitioner's trial counsel were "chilled" from presenting evidence of petitioner's allegedly difficult childhood at the time of petitioner's 1981 capital murder trial.

These arguments are without merit. This Court applied the correct legal standard in denying petitioner a CoA.[4] There is no basis for discord among jurists of reason

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[3] Contrary to the assertions in petitioner's latest pleading, the Texas Court of criminal Appeals' construction and application of state law rules of harmless error do not raise an arguable constitutional claim with regard to petitioner's purported **Witherspoon** claim because the holding in **Witherspoon** is irrelevant to the facts of petitioner's case. Federal habeas corpus relief exists to ensure that a prisoner's federal constitutional rights are protected, not to ensure proper application of state law principles.

[4] See **Lamb v. Johnson**, 179 f.3d 352, 356 (5th Cir.), **cert. denied**, 120 S. Ct. 522 (1999) (holding that while the nature of the penalty involved in a capital case is a proper consideration in determining whether to grant a CoA, the

on the fact that virtually all of petitioner's claims herein, including his pseudo-**Witherspoon** claim, are foreclosed by the **Teague** doctrine. Furthermore, petitioner's "chilling" argument has been repeatedly rejected by the Fifth Circuit in cases in which the Supreme Court has denied certiorari.

The short answer to petitioner's "chilling" argument claim is the attorneys for Mr. Penry were not foreclosed or "chilled" from presenting the same type of evidence petitioner argues he was unable to present at his trial. Furthermore, petitioner's trial counsel testified at the evidentiary hearing in state court that he was aware of no evidence of the nature petitioner presented at the state court hearing on petitioner's state habeas corpus application. Furthermore, said counsel testified that he met prior to trial with the same brother of the petitioner who later professed ignorance of the fact the petitioner was on trial for capital murder and then came forward years later with bizarre allegations of child abuse that completely contradicted the trial testimony of petitioner's family and pastor regarding the idyllic upbringing the petitioner enjoyed as a child. Petitioner's trial counsel did not render ineffective assistance by failing to present evidence which would have undermined their trial strategy of showing the petitioner did not pose a threat of future violence. Likewise, petitioner's trial counsel could hardly have been "chilled" from presenting evidence of which he was never made aware of by either the petitioner or petitioner's family.

For the reasons set forth in this Court's 158-page Memorandum Opinion and Order issued March 28, 2000, petitioner is entitled to no relief from this Court and is not entitled to a CoA.

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severity of the penalty does not itself suffice to warrant an automatic issuance of a CoA).

Accordingly, it is hereby **ORDERED** that all relief requested in petitioner's motion to alter and amend judgment, filed April 11, 2000,[5] is **DENIED**

It is so ORDERED.

SIGNED this 16th day of April, 2000.

/s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

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[5] See docket entry no. 25.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MIGUEL A. RICHARDSON,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	**CIVIL NO. SA-**
GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,	§	**98-CA-775-FB**
	§	
	§	
	§	
Respondent.	§	
	§	

MEMORANDUM OPINION AND ORDER DENYING FEDERAL HABEAS CORPUS RELIEF

After almost two decades in the state court system, petitioner Miguel A. Richardson filed this federal habeas corpus action pursuant to Title 28 U.S.C. Section 2254 challenging his September, 1981, capital murder conviction and sentence of death. As grounds for relief, petitioner presents many claims. However, for the reasons set forth at length below, the Supreme Court's holding in **Teague v. Lane**[1] precludes this Court from granting federal habeas corpus relief premised on claims petitioner presents herein. Furthermore, this Court has conducted a de novo review of all of the petitioner's claims herein and finds them to be without merit. Given the overwhelming evidence of the petitioner's guilt and the undisputed evidence of petitioner's penchant for

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[1] 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

violent conduct even while in custody, virtually all of the petitioner's complaints herein rise no higher than that of harmless error. Therefore, this Court will deny petitioner's request for federal habeas corpus relief and deny petitioner a Certificate of Appealability.

I. Statement of the Case

A. Factual Background

A brief recitation of the facts and procedural history should help to explain why this cause first arrived on the door step of this Court more than nineteen (19) years after the petitioner committed his offense.

1. The Crime and Its Aftermath

There has never been any serious doubt that, on March 31, 1979, petitioner shot and killed two uniformed, unarmed, security guards at a Holiday Inn in San Antonio.[2]

For the purpose of this proceeding, this Court notes the evidence at the guilt-innocence phase of petitioner's 1981 trial was undisputed that (1) late on the evening of March 31, 1979, a Holiday Inn employee directed security guards John Ebbert and Howard Powers to respond to a report of a man attempting to break into a fourth floor room, (2) minutes later, hotel personnel received a call reporting gun shots, (3) less than an hour later, the lifeless bodies of the two security

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[2] The facts of the petitioner's crime are set forth in detail in the first of three Texas Court of Criminal Appeals' published opinions affirming petitioner's conviction and sentence. See **Richardson v. State**, 744 S.W.2d 65, 71-72 (Tex. Crim. App. 1987).

guards were found in a first floor stairwell, (4) when discovered, Powers' body was handcuffed, (5) both victims had been shot at close range in the head and chest, and (6) the empty wallet of one victim was found nearby.[3]

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[3] See Statement of Facts from Petitioner's Trial (henceforth "S.F. Trial"), Volume 4, testimony of David Raymond Snell, at pp. 35-47; and testimony of Rafael Garcia, at pp. 78-80. A hotel employee, David Raymond Snell, testified that (1) on the night in question, he received three telephone calls from the frightened guests in a fourth floor room, i.e., room number 494, complaining that someone was banging on their door trying to get into their room, (2) after the first call, it took him two or three minutes to contact Ebbert and Powers and dispatch them to the room, (3) shortly after they left the front desk area, he received the second call from the same room urging that assistance be sent, (4) he later received a third call from the same guests reporting that they had heard gun shots, and (5) when Ebbert and Powers failed to return to the lobby, he began searching for them and made his gruesome discovery of their lifeless bodies about forty-five minutes later in the first floor stair well. See S.F. Trial, Volume 4, testimony of David Raymond Snell, at pp. 39-43, 45-46, and 50-59. The first police officer at the scene, Rafael Garcia, testified that when he arrived, a desk clerk directed him to the first floor stairwell, where he discovered two "very dead" bodies that had been shot several times and displayed no vital signs, one of which had been handcuffed. See S.F. Trial, Volume 4, testimony of Rafael Garcia, at pp. 78-80. The forensic pathologist who performed the autopsies of Ebbert and Powers testified at petitioner's trial that (1) Ebbert sustained a total of three bullet wounds, two to the head and one to

It was likewise undisputed that (1) the petitioner, who had registered under an alias, and three minor females were staying in the room directly across the hall from one which made the calls for help on the night in question,[4] (2) a few

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the chest, (2) Ebbert's head wounds consisted of entry wounds to the chin and nose which appeared to have been fired at close range, i.e., approximately three feet, (3) the bullet which entered Ebbert's face near his nose penetrated the brain and would have been instantly fatal by itself, (4) the bullet which penetrated Ebbert's chest penetrated his lung and heart and would have been instantly fatal by itself, (5) Powers, who was handcuffed, was shot in both the eye and the chest, (6) the shot that struck Powers in the eye was fired at close range, i.e., from approximately three feet, (7) the bullet that caused Powers' chest wound penetrated the heart and left lung and exited near the tip of the shoulder blade, (8) Powers' chest wound showed indications of being a loose contact wound, i.e., signs the gun muzzle was pressed against the chest when it was fired, and (9) Powers' chest wound would have been instantly fatal by itself. See S.F. Trial, Volume 4, testimony of Robert Swedarsky, at pp. 195-24.

[4] See S.F. Trial, Volume 4, testimony of Jackie Benton, at pp. 136-41; testimony of Thomas M. Wilson, at pp. 129-31; testimony of Rudy Vernon, at p. 147; testimony of James Heckman, at p. 160; and State's Trial Exhibit 16.

Hotel employee Jackie Benton identified the petitioner as the person whom she registered under the name Michael Coleman, a purported representative of a company called "On the Top in High Fashion," on March 30, 1979. **Id.**, Volume 4, at pp. 136-41. Another hotel employee, Thomas M. Wilson, furnished the business records basis

days before the incident, the petitioner bought a meal for a man named Rivers Campbell and paid Campbell one hundred dollars to purchase a .38 caliber pistol from a Galveston pawn shop,[5] (3) the particular weapon Campbell purchased for petitioner was a Titan Tiger .38 Special,[6] and (4) the weapon

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for the admission of State's Trial Exhibit 16, the registration ticket for room 495 dated March 30, 1979. **Id.**, Volume 4, at pp. 129-31. Two San Antonio police officers who participated in the investigation of the crime each testified that room 495 was directly across the hall from room 494, the source of the excited calls for help on the night of the murders. **Id.**, Volume 4, at pp. 147 and 160. Shortly after petitioner's arrest in Colorado, a law enforcement officer executing a search warrant found a business card among petitioner's possessions bearing the company name "On the Top in High Fashion Modeling Agency For Young Women" and the name "Richardson." See S.F. Trial, Volume 5, testimony of John Dunmon, at p. 15; and State's Trial Exhibit 38.

Petitioner's companions Victoria Franklin and Rhonda Bearden both testified that petitioner checked into the Holiday Inn under the alias Michael Coleman and that petitioner sent Bearden down to the front desk the day of the murders to pose as "Mrs. Coleman." See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 301-03; and Volume 5, testimony of Victoria Franklin, at p. 186.

[5] See S.F. Trial, Volume 5, testimony of Rivers Campbell, at pp. 47-54.

[6] See S.F. Trial, Volume 5, testimony of Giles Bennett, at pp. 24-25.

that fired the fatal shots that struck Ebbert and Powers was an Armanius Titan Tiger .38 caliber handgun.[7]

Each of the petitioner's three female traveling companions testified that the petitioner remarked before the murders that (1) he had seen a lady's diamond ring worn by a hotel guest staying across the hall from their room, (2) he wanted to have the ring, and (3) he planned to rob the ladies staying across the hall from their room.[8] These same witnesses testified that, the day after the murders, the petitioner (1) directed one of them to tell investigating officers she knew nothing of the crime, (2) told them he had obtained over two hundred fifty dollars from his victims and displayed same to one of his companions, (3) described how the two guards had begged for their lives, (4) directed them to bring in the clothes hanging on the porch outside their room, stay in San Antonio an extra day, and leave in two separate groups, so as to avoid suspicion, and (5) directed one of them to carry his gun in her suitcase when the group departed from San Antonio.[9]

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[7] See S.F. Trial, Volume 4, testimony of Richard Stengel, at pp. 171-76.

[8] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 273-74, 285-89, and 340-42; Volume 5, testimony of Lisa Laursen, at pp. 73-74; and Volume 5, testimony of Victoria Franklin, at p. 174.

[9] See S.F. Trial, Volume 4, testimony of Rhonda Bearden, at pp. 282-85 and 289-92; Volume 5, testimony of Lisa Laursen, at pp. 76-82; and Volume 5, testimony of Victoria Franklin, at pp. 178-79, 186-89, and 192.

More specifically, the testimony at the guilt-innocence phase of trial was also clear that, in the days which followed the shooting, petitioner confessed to a sixteen-year-old prostitute with whom he was traveling named Rhonda Bearden that (1) the two security guards had caught him attempting to break into a room across the hall from where petitioner and his underage female companions were staying, (2) the two security guards accompanied him down the stairs, (3) when they reached the first floor stairwell, the petitioner drew his gun on the unarmed guards, who begged petitioner not to kill them and gave the petitioner their money, and (4) the petitioner then woke up another of his underage female companions, named Vicky Franklin, and directed her to take a towel to the first floor stairwell to wipe away any fingerprints from the door.[10]

After petitioner unsuccessfully attempted to convince the trial court that Franklin was his common law wife, Franklin testified that, (1) on the night of the murders, petitioner woke her up and told her he had killed two security guards, (2) the same night, petitioner gave her the gun and directed her to clean it and flush the shells down the toilet, (3) petitioner also directed her to take a towel, go see if the guards were dead, and wipe off the fingerprints from the door, and (4) petitioner told her he had held the two guards at gun point, they begged for their lives, he told them he would not kill them if they gave him money, he received two hundred

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[10] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 284-89 and 340-43.

fifty dollars from one guard, but shot them both when the other guard produced only two dollars.[11]

After petitioner unsuccessfully attempted to convince the trial court that a fellow Denver jail inmate named Mark Stanley Seiver was his "common law" attorney, Seiver testified the petitioner told him initially that Franklin shot the guards, but petitioner later admitted that (1) he obtained a gun from a Galveston pawn shop, (2) the two guards caught petitioner in an attempted burglary of a nearby room where several hotel guests who wore expensive jewelry were staying, (3) the guards were taking petitioner down the stairwell when petitioner produced a firearm, handcuffed one of the guards, and killed them both, and (4) he disposed of the murder weapon by throwing it into a body of water in Colorado.[12]

Shortly after the fatal shootings, petitioner and two of the three underage prostitutes, who worked for and were traveling with the petitioner, took a flight from San Antonio and reached Denver, Colorado, before they were apprehended.[13] Petitioner fought extradition for more than two years, during which time he engaged in two violent, but unsuccessful attempts to murder jail guards and escape from

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[11] See S.F. Trial, Volume 5, testimony of Victoria Ann Franklin, at pp. 175-89 and 192.

[12] See S.F. Trial, Volume 4, testimony of Mark Stanley Seiver, at pp. 371-79.

[13] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 290-96 and 308-12; Volume 5, testimony of Lisa Larsen, at pp. 74-82; Volume 5, testimony of Victoria Ann Franklin, at pp. 189-92 and 195.

custody.[14] Eventually, petitioner was returned to Texas. On May 20, 1981, a Bexar County grand jury indicted petitioner in cause no. 81-CR-1548 for intentionally and knowingly killing one of the two unarmed, hotel security guards,

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[14] Although the following testimony was not introduced until the punishment phase of petitioner's trial, for purposes of chronological integrity, this Court notes that, while fighting extradition in Colorado, (1) on November 13, 1979, during a trip to the hospital, petitioner successfully grabbed the handgun of an accompanying officer and twice tried to pull the trigger of that weapon while it was pointed at the officer, all the while threatening the officer, but the officer managed to wedge a finger behind the trigger of the gun, see S.F. Trial, Volume 6, testimony of Joe Sanger, at pp. 37-44; (2) on April 20, 1980, petitioner grabbed a fire extinguisher off the wall and attempted to strike a detention officer with same, see S.F. Trial, Volume 6, testimony of Ralph Vickrey, at pp. 16-18 and 31; (3) during his detention pending extradition, petitioner repeatedly threatened jail personnel and specially stated that if he were ever released, he would kill every one of the guards with whom he had contact, see S.F. Trial, Volume 6, testimony of Ralph Vickrey, at pp. 31-32; (4) on June 19, 1980, during another trip to the hospital, petitioner produced a homemade shank and stabbed an accompanying officer in the neck deep enough to penetrate to the spine, see S.F. Trial, Volume 6, testimony of Kenneth Hall, at pp. 71-77.

i.e., John G. Ebbert, in the course of committing or attempting to commit the robbery of Ebbert.[15]

On September 16, 1981, a Bexar County jury convicted petitioner of capital murder.[16] Two days later, that same jury affirmatively answered the two Texas capital sentencing special issues submitted to them and the trial court imposed a sentence of death upon petitioner.[17] On November 24, 1981, the trial court held an evidentiary hearing and denied petitioner's motion for new trial.[18]

2. Direct Appeals

On October 28, 1987, the Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence.[19] On July 2, 1989, however, the United States Supreme Court vacated petitioner's conviction and sentence and remanded the case to the Texas Court of Criminal Appeals for further

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[15] See Transcript of pleadings, motions, and other documents filed in petitioner's state trial court proceeding (henceforth "Transcript"), at p. 8.

[16] See Transcript, at pp. 198-200; and S.F. Trial, Volume 5, at pp. 247-49.

[17] See Transcript, at p. 223; and S.F. Trial, Volume 6, at pp. 315-17 and 319-21.

[18] See S.F. Trial, Volume 6, at pp. 322-49.

[19] See **Richardson v. State**, 744 S.W.2d 65 (Tex. Crim. App. 1987), **vacated**, 492 U.S. 914 (1989).

consideration in light of the Supreme Court's then-recent opinion in **Penry v. Lynaugh**.[20]

In a second opinion issued June 12, 1991, the Texas Court of Criminal Appeals again affirmed petitioner's conviction and sentence, holding petitioner's evidence of his good deeds, good character traits, and "deprived" childhood did not fall within the scope of the Supreme Court's holding in **Penry**.[21] On June 28, 1993, the United States Supreme Court again vacated petitioner's conviction and remanded the case to the Texas Court of Criminal Appeals for further consideration in light of its then-recent opinion in **Johnson v. Texas**.[22]

On June 1, 1994, the Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence for a third time, once again holding the evidence petitioner presented at his 1981 trial did not fall within the parameters of the Supreme Court's narrow holding in **Penry**.[23] On June 26, 1995, the Supreme Court denied petitioner's third certiorari petition.[24]

3. State Habeas Corpus Proceeding

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[20] See **Richardson v. Texas**, 492 U.S. 914 (1989).

[21] See **Richardson v. State**, 886 S.W.2d 769, 771-76 (Tex. Crim. App. 1991), **vacated**, 509 U.S. 917 (1993).

[22] See **Richardson v. Texas**, 509 U.S. 917 (1993).

[23] See **Richardson v. State**, 901 S.W.2d 941 (Tex. Crim. App. 1994), **cert. denied**, 515 U.S. 1162 (1995).

[24] See **Richardson v. Texas**, 515 U.S. 1162 (1995).

On December 17, 1996, petitioner filed a state habeas corpus application in which he presented some fifteen grounds for relief.[25]

As grounds for relief, in his application, petitioner argued that (1) the state trial court erroneously excluded a **Witherspoon** qualified juror, (2) the trial court erroneously admitted evidence of petitioner's conviction while still a juvenile under the now-defunct Federal Youth Corrections Act, (3) petitioner's 1981 jury was unable to give mitigating effect to petitioner's evidence of his good character traits, "deprived" family background, and mental impairment, (4) the trial court erroneously admitted testimony of the prosecution's expert psychologist, (5) the Texas scheme of lethal injection as the method of execution does not minimize risks of unnecessary infliction of pain and suffering, (6) petitioner's stay of fifteen years on death row is itself a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, (7) the trial court erred in failing to instruct the jury at the punishment phase of petitioner's trial that petitioner could be eligible for release on parole in as few as twenty years, (8) the trial court erred in admitting evidence allegedly seized illegally in Colorado, (9) the trial court improperly limited the cross-examination of prosecution witnesses, (10) the trial court permitted petitioner to be shackled during trial, (11) the trial court erroneously permitted the introduction of inflammatory evidence, (12) Article 37.071(g) of the Texas Code of Criminal Procedure, as applied to petitioner's case, prevented

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[25] A copy of petitioner's 129-page state habeas corpus application appears among the voluminous state court records from petitioner's state habeas corpus proceeding in Volume One.

petitioner's jury from understanding its role, (13) the jury instructions erroneously defined the culpable mental state necessary for a capital murder conviction under Texas law, (14) petitioner's trial and appellate counsel rendered ineffective assistance, and (15) the cumulative effect of the foregoing errors warrants granting petitioner a new trial, vacating his death sentence, or both.

The state trial court held an extensive evidentiary hearing on petitioner's state habeas claims, commencing on April 29, 1997, and finally concluding on July 1, 1997.[26]

In an Order issued October 1, 1997, the state trial court concluded several of petitioner's claims for state habeas relief had already been decided adversely to petitioner in the course of petitioner's direct appeal, found no evidence the method of execution employed by the State of Texas actually causes unnecessary pain, found any delay in petitioner's execution was the result of the petitioner's own efforts to seek review of his conviction and sentence, and concluded all of the petitioner's claims for relief were without merit, and recommended denial of petitioner's state habeas corpus application.[27]

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[26] The verbatim transcription or Statement of Facts from petitioner's state habeas corpus evidentiary hearing (henceforth "State Habeas Hearing") appears as Volumes III of VIII through VII-A of VIII among the state court records relating to petitioner's state habeas corpus proceeding.

[27] A copy of the state trial court's Order of October 1, 1997, appears at the front of VOLUME FOUR of the pleadings relating to petitioner's state habeas corpus proceeding herein. Unfortunately, the copy of that volume which this

In an unpublished, per curiam, Order issued June 10, 1998, the Texas Court of Criminal Appeals found the state trial court's findings of fact and conclusions of law were fully supported by the record and denied state habeas corpus relief.[28]

B. Procedural History

On August 28, 1998, petitioner filed a motion for stay of execution in this Court and a motion requesting appointment of counsel.[29] In an Order issued August 31, 1998, this Court stayed petitioner's execution, appointed counsel to represent petitioner, and set deadlines for the filing of petitioner's federal habeas corpus petition and the response thereto.[30]

On October 8, 1998, petitioner filed a federal habeas corpus petition in which he argued (1) the state trial court erred in refusing to instruct the jury at the punishment phase of petitioner's trial that petitioner could be eligible for parole in as few as twenty years, (2) the Texas capital sentencing scheme in existence as of 1981 had a chilling effect on the ability of petitioner's trial counsel to introduce "mitigating" evidence of petitioner's antisocial personality syndrome and the history of physical and sexual abuse petitioner had

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Court received from the respondent does not bear any page numbers.

[28] See **Ex parte Miguel A. Richardson**, Writ No. 29, 821-02 (Tex. Crim. App. June 10, 1998).

[29] See docket entry nos. 1 and 5.

[30] See docket entry no. 7.

experienced as a child, (3) the trial court erred in excluding on its own motion a potential juror who was qualified under ***Witherspoon***, (4) the method of lethal injection employed in Texas does not adequately reduce the risk of extreme pain and suffering during execution, (5) petitioner's trial counsel rendered ineffective assistance, (6) the trial court erroneously admitted evidence of petitioner's conviction under the Federal Youth Corrections Act, (7) the seventeen-year delay since petitioner's conviction renders petitioner's execution at this date a violation of constitutional and international law, (8) application of Texas' twelve/ten rule violated petitioner's constitutional rights, (9) the trial court erred in admitting evidence of victim impact and petitioner's extraneous criminal conduct, (10) the trial court erroneously limited cross-examination of prosecution witnesses, and (11) the cumulative effect of the foregoing errors warrant federal habeas corpus relief.[31] On December 10, 1998, petitioner filed an amended federal habeas corpus petition which asserted essentially the same claims as his original petition.[32]

On January 13, 1999, respondent filed an answer and motion for summary judgment in which he asserted petitioner's claims herein are either foreclosed by the Supreme Court's holding in **Teague**, assertions of harmless error, or simply without merit.[33]

On March 8, 1999, petitioner filed a pleading in which he urged this Court to disregard the Antiterrorism and

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[31] See docket entry no. 9.

[32] See docket entry no. 15.

[33] See docket entry no. 16.

Effective Death Penalty Act of 1996 ["AEDPA"][34] and conduct a de novo review of each of the petitioner's claims for relief herein and argued this Court should hold a new evidentiary hearing because the petitioner's extensive state habeas corpus proceedings were a "sham."[35]

II. Standard of Review

A. Antiterrorism and Effective Death Penalty Act of 1996

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"],[36] which radically altered the standard of review by this Court in federal habeas corpus proceedings filed by state prisoners pursuant to Title 28 U.S.C. Section 2254.[37]

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[34] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[35] See docket entry no. 19.

[36] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[37] See **Nobles v. Johnson**, 127 F.3d 409, 412-15 (5th Cir. 1997), **cert. denied**, 523 U.S. 1139 (1998); **Hernandez v. Johnson**, 108 F.3d 554,557 n.2 (5th Cir.), **cert. denied**, 522 U.S. 984 (1997); **Brown v. Cain**, 104 F.3d 744, 748-49 (5th Cir.), **cert. denied**, 520 U.S. 1195 (1997); **Childress v. Johnson**, 103 F.3d 1221, 1224 (5th Cir. 1997); **Mata v. Johnson**, 99 F.3d 1261, 1265-66 (5th Cir. 1996), **vacated in part and modified on other grounds**, 105 F.3d 209 (5th Cir. 1997); **Herman v. Johnson**, 98 F.3d 171, 173 (5th Cir. 1996), **cert. denied**, 520 U.S. 1123 (1997); **Drinkard v. Johnson**, 97 F.3d 751, 756 (5th Cir. 1996), **cert. denied**, 520 U.S. 1107 (1997).

Prior to the Supreme Court's recent opinion in **Lindh v. Murphy**,[38] the Fifth Circuit had held in several opinions that the new standard of review provisions of the AEDPA governed federal court review of all federal habeas corpus petitions filed by state prisoners, including those petitions pending as of the effective date of that enactment.[39] However, the holding in **Lindh** limits the applicability of the AEDPA's new standard of review provisions to those petitions filed after the effective date of that enactment, i.e., after April 24, 1996.[40] This aspect of the holding in **Lindh** does not apply to

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38 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

39 See **Carter v. Johnson**, 110 F.3d 1098, 1103 (5th Cir.), **vacated** 522 U.S. 964 (1997); **Hernandez v. Johnson**, 108 F.3d at 557-58; **Brown v. Cain**, 104 F.3d at 748-49; **Lockhart v. Johnson**, 104 F.3d 54, 56-57 (5th Cir.), **cert. denied**, 521 U.S. 1123 (1997); **Childress v. Johnson**, 103 F.3d at 1224; **Mata v. Johnson**, 99 F.3d at 1266; **Drinkard v. Johnson**,97 F.3d at 767.

40 See **Corwin v. Johnson**, 150 F.3d 467, 471 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 613 (1998) (holding that the AEDPA applies to all federal habeas corpus petitions filed after the effective date of that enactment, i.e., April 24, 1996); **Hogue v. Johnson**, 131 F.3d 466, 469 n.l (5th Cir. 1997), **cert. denied**, 523 U.S. 1014 (1998); **Carter v. Johnson**, 131 F.3d 452, 457 (5th Cir. 1997), **cert. denied**, 523 U.S. 1099 (1998); **Nobles v. Johnson**, 127 F.3d at 413-15 (holding that a federal habeas petition filed after the effective date of the AEDPA was governed by the standard of review set forth in the AEDPA despite the fact petitioner had filed other motions in that cause prior to April 24, 1996).

this cause because petitioner filed this federal habeas corpus action after the effective date of the AEDPA.[41]

Under the AEDPA's new standard of review, this Court cannot grant petitioner federal habeas corpus relief in this cause in connection with any claim which was adjudicated on the merits in state court proceedings unless the adjudication of that claim either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[42] A

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[41] See **Robison v. Johnson**, 151 F.3d 256, 258 n.2 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 1578 (1999) (holding that the critical date for determining the applicability of the AEDPA is the date the petitioner filed his federal habeas corpus petition); **Corwin v. Johnson**, 150 F.3d at 471; **Nobles v. Johnson**, 127 F.3d at 413-15.

[42] See **Miller v. Johnson**, 200 F.3d 274, 281 (5th Cir. 2000) (recognizing that under the AEDPA, an application of law to facts is unreasonable only when reasonable jurists considering the question would be of one view that the state court ruling was incorrect, i.e., only if the state court decision was so clearly incorrect that it would not be debatable among reasonable jurists); **Jones v. Jones**, 163 F.3d 285, 299 (5th Cir. 1998), **cert. denied**, 120 S. Ct. 224 (1999); **Davis v. Johnson**, 158 F.3d 806, 812 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 1474 (1999); **Robison v. Johnson**, 151 F.3d at 265-66 (holding that an application of federal law is "unreasonable" only if it is so clearly incorrect that it would not be debatable among reasonable jurists; in other words, an application of law to facts is

reasonable, good faith application of Supreme Court precedent will immunize the state court conviction from federal habeas reversal, even if federal courts later reject that

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unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect); **Corwin v. Johnson**, 150 F.3d at 471-72 (holding that pure questions of law and mixed questions of law and fact are reviewed under § 2254(d)(1) and questions of fact are reviewed under § 2254(d)(2) and that an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect); **Nobles v. Johnson**, 127 F.3d at 416 (holding that the unreasonable application standard requires more than mere disagreement with the state court decision, rather, the petitioner must show that the state court decision is so clearly incorrect that it would not be debatable among reasonable jurists); **Williams v. Cain**, 125 F.3d 269, 276-77 (5th Cir. 1997), **cert. denied**, 119 S. Ct. 144 (1998); **Hernandez v. Johnson**, 108 F.3d at 557 n.2; **Brown v. Cain**, 104 F.3d at 748-49; **Lockhart v. Johnson**, 104 F.3d at 56-57; **Childress v. Johnson**, 103 F.3d at 1224; **Mata v. Johnson**, 99 F.3d at 1267; **Drinkard v. Johnson**, 97 F.3d at 767-69.

Pursuant to the AEDPA, in this Circuit, pure questions of law are reviewed under the "contrary to" standard; mixed questions of law and fact are reviewed under the "unreasonable application" standard; and pure questions of fact are reviewed under the "unreasonable determination of the facts" standard. **Lamb v. Johnson**, 179 F.3d 352, 356 (5th Cir.), **cert. denied**, 120 S. Ct. 522 (1999); **Drinkard v. Johnson**, 97 F.3d at 767-69.

view of the applicable precedent.[43] In federal habeas corpus proceedings, a resolution or adjudication "on the merits" is a term of art that refers to whether a court's disposition of the claim was substantive, as opposed to procedural.[44] The AEDPA also significantly restricts the scope of federal habeas review of state court fact findings[45] and limits the

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[43] See **Miller v. Johnson**, 200 F.3d at 281; **Robison v. Johnson**, 151 F.3d at 266; **Corwin v. Johnson**, 150 F.3d at 471-72; **Nobles v. Johnson**, 127 F.3d at 416; **Williams v. Cain**, 125 F.3d at 277; **Mata v. Johnson**, 99 F.3d at 1268; **Drinkard v. Johnson**, 97 F.3d at 769.

[44] See **Miller v. Johnson**, 200 F.3d at 281; **Green v. Johnson**, 116 F.3d 1115, 1121 (5th Cir. 1997).

[45] See **Miller v. Johnson**, 200 F.3d at 281 (state court fact findings are presumed correct and the petitioner has the burden of rebutting the presumption by clear and convincing evidence); **Hicks v. Johnson**, 186 F.3d 634, 637 (5th Cir. 1999), **cert. denied**, 120 S. Ct. 976 (2000)(holding the AEDPA requires federal habeas courts to accept as correct state court factual determinations unless the petitioner rebuts same by clear and convincing evidence); **Williams v. Cain**, 125 F.3d at 277 (recognizing that under the AEDPA, state court factual findings "shall be presumed correct unless rebutted by 'clear and convincing evidence'"); **Hernandez v. Johnson**, 108 F.3d at 558 & n.4 (holding that under the AEDPA, the proper forum for the making of all factual determinations in habeas cases will shift to the state courts "where it belongs" and recognizing that the AEDPA clearly places the burden on the federal habeas petitioner "to raise and litigate as fully as possible his potential federal claims in state court"); 28 U.S.C. § 2254(e)(1).

circumstances in which a habeas corpus petitioner can obtain an evidentiary hearing in federal court.[46]

In the course of petitioner's state habeas corpus proceeding, the state court expressly rejected all claims petitioner has presented to this Court. However, in so doing, the Texas Court of Criminal Appeals relied upon findings of fact and conclusions of law which dismissed many of the petitioner's claims on the ground the same arguments had been rejected during the course of petitioner's direct appeal. In denying petitioner's state habeas corpus application, the Texas Court of Criminal Appeals did rely upon state trial court findings of fact and conclusions of law that addressed the merits of some of the same claims petitioner presents to this Court.

The AEDPA places great value upon the factual findings and conclusions of law made by state courts in the course of petitioner's state habeas corpus proceedings. Under the AEDPA, because the state habeas court rejected on the merits some of the petitioner's federal claims, this Court is virtually bound by the state court rulings on those issues unless the petitioner can satisfy the standard outlined above by showing the state court's holdings were based upon either an unreasonable application of clearly established federal law or an unreasonable determination of the facts from the evidence before that court. An application of federal law is unreasonable when reasonable jurists considering the issue would be of one view that the state court ruling was incorrect,

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[46] See **Clark v. Johnson**, 202 F.3d 760, 765 (5th Cir. 2000); **Robison v. Johnson**, 151 F.3d at 269; **McDonald v. Johnson**, 139 F.3d 1056, 1059 (5th Cir. 1998); 28 U.S.C. § 2254(e)(2).

i.e., the state court's decision is so clearly incorrect that it would not be debatable among reasonable jurists.[47] Under the AEDPA, any state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[48]

Although logic would seem to favor respondent's position, it is unclear at this juncture whether the Supreme Court or the Fifth Circuit is prepared to adopt a rule in which a state habeas court's rejection of a federal claim on the ground the same claim was rejected on the merits during the course of the prisoner's direct appeal constitutes a ruling "on the merits" for purposes of the highly deferential standard of review mandated by the AEDPA. By analogy, the Fifth Circuit's practice of "looking through" a summary denial of state habeas corpus relief by the Texas Court of Criminal Appeals to a Texas trial court's findings of fact and conclusions of law would appear to support a practice of "looking through" a summary rejection of a state habeas claim to the previous state appellate court opinion rejecting that same claim on the merits. However, the Fifth Circuit has not yet specifically approved such a practice.

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[47] See **Miller v. Johnson**, 200 F.3d at 281; **Morris v. Cain**, 186 F.3d 581, 583 (5th Cir. 1999); **Lamb v. Johnson**, 179 F.3d at 356; **Jones v. Jones**, 163 F.3d at 299; **Davis v. Johnson**, 158 F.3d at 812; **Corwin v. Johnson**, 150 F.3d at 471-72; **Drinkard v. Johnson**, 97 F.3d at 769.

[48] See **Morris v. Cain**, 186 F.3d at 583; **Davis v. Johnson**, 158 F.3d at 812; **Jackson v. Johnson**, 150 F.3d 520, 524 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 1339 (1999); 28 U.S.C. § 2254(e)(1).

Furthermore, petitioner contends the Fifth Circuit's transformation of the AEDPA's standard of review provisions into little more than a rubber stamp, in a manner similar to the Fourth Circuit's interpretation of the AEDPA currently under scrutiny by the United States Supreme Court, is inconsistent with both common sense and the constitutional limitations on the authority of Congress to limit the scope of federal habeas corpus review.

Under such circumstances, this Court believes the best approach to analyzing petitioner's claims herein is to conduct both conduct a de novo review of same, as well as apply the AEDPA standard of review. Under either standard, petitioner's claims warrant neither a Certificate of Appealability nor an evidentiary hearing nor federal habeas corpus relief.

B. State Law Issues in Federal Habeas Corpus Proceedings

A state prisoner seeking federal court review of his conviction pursuant to Title 28 U.S.C. Section 2254 must assert a violation of a federal constitutional right.[49] Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented.[50] In the course of reviewing state

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[49] **Lawrence v. Lensing**, 42 F.3d 255, 258 (5th Cir. 1994); **Gray v. Lynn**, 6 F.3d 265, 268 (5th Cir. 1993); **Lowery v. Collins**, 988 F.2d 1364, 1367 (5th Cir. 1993).

[50] See **Estelle v. McGuire**, 502 U.S. 62, 67-68 (1991); **Lewis v. Jeffers**, 497 U.S. 764, 780 (1990); **Pulley v. Harris**, 465 U.S. 37, 41 (1984); **Green v. Johnson**, 160 F.3d 1029, 1035 (5th Cir. 1998), **cert. denied**, 525 U.S. 1174 (1999); **Hallmark v. Johnson**, 118 F.3d 1073, 1080

criminal convictions in federal habeas corpus proceedings, a federal court does not sit as a super-state appellate court.[51] The question before a federal habeas corpus court is not whether the state court correctly applied its own interpretation of state law; rather, the question is whether petitioner's federal constitutional rights were violated.[52]

(5th Cir.), **cert. denied sub nom. Johnson v. Monroe**, 522 U.S. 1003 (1997); **West v. Johnson**, 92 F.3d 1385, 1404 (5th Cir. 1996), **cert. denied**, 520 U.S. 1242 (1997); **Pemberton v. Collins**, 991 F.2d 1218, 1223 (5th Cir.), **cert. denied** 510 U.S. 1025 (1993); **Lavernia v. Lynaugh**, 845 F.2d 493, 496 (5th Cir. 1988); **Rault v. Butler**, 826 F.2d 299, 302 n.l (5th Cir.), pert. denied, 483 U.S. 1042 (1987); **Neyland v. Blackburn**, 785 F.2d 1283, 1293 (5th Cir.), **cert. denied**, 479 U.S. 930 (1986).

[51] **Dickerson v. Guste**, 932 F.2d 1142, 1145 (5th Cir.), **cert. denied**, 502 U.S. 875 (1991). "[F]ederal courts do not sit as courts of appeal and error for state court convictions." **Dillard v. Blackburn**, 780 F.2d 509, 513 (5th Cir. 1986). Accord **Bridge v. Lynaugh**, 838 F.2d 770, 772 (5th Cir. 1988). This Court does not review a state prisoner's federal habeas corpus petition to determine whether the state appellate courts correctly construed and applied state law. Federal habeas corpus relief does not lie for errors of state law. See **Estelle v. McGuire**, 502 U.S. at 67-68; **Lewis v. Jeffers**, 497 U.S. at 780; **Pulley v. Harris**, 465 U.S. at 41; **Pemberton v. Collins**, 991 F.2d at 1223; **Lavernia v. Lynaugh**, 845 F.2d at 496; **Rault v. Butler**, 826 F.2d at 302 n.l; **Neyland v. Blackburn**, 785 F.2d at 1293.

[52] See **Neyland v. Blackburn**, 785 F.2d at 1289.

> When a federal district court reviews a state prisoner's habeas petition pursuant to 28 U.S.C. § 2254 it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." The court does not review a judgment, but the lawfulness of the petitioner's custody simpliciter.[53]

Thus, the issue before this Court is not whether the Texas courts properly applied state law principles during petitioner's trial or when they affirmed petitioner's conviction and sentence or denied petitioner's state habeas corpus application, but whether petitioner's federal constitutional rights have been violated.

Therefore, insofar as petitioner argues his state statutory or state constitutional rights were violated, independently of any federal constitutional violation, his arguments do not furnish an arguable basis for federal habeas corpus relief.

C. Non-Retroactivity Doctrine of **Teague v. Lane**

Under the Supreme Court's holding in **Teague v. Lane**, federal courts are generally barred from applying new constitutional rules of criminal procedure retroactively on collateral review.[54] A "new rule" is one which was not

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[53] **Coleman v. Thompson**, 501 U.S. 722, 730(1991).

[54] See **Teague v. Lane**, 489 U.S. 288, 310 (1989); **Caspari v. Bohlen**, 510 U.S. 383, 389-90 (1994); **Matthew v. Johnson**, 201 F.3d 353, 359 (5th Cir. 2000); **Johnson v. Puckett**, 176 F.3d 809, 819 (5th Cir. 1999); **Vega v. Johnson**, 149 F.3d 354, 357 (5th Cir. 1998), **cert.**

dictated by precedent existing at the time defendant's conviction became final.[55] Under this doctrine, unless reasonable jurists hearing defendant's claim at the time his

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denied, 525 U.S. 1119 (1999); **Johnson v. Scott**, 68 F.3d 106, 111 n.10 (5th Cir. 1995), **cert. denied**, 517 U.S. 1122 (1996); **Lackey v. Scott**, 52 F.3d 98, 100 (5th Cir. 1995), **stay granted and cert. dismissed**, 514 U.S. 1093 (1995); **Davis v. Scott**, 51 F.3d 457, 466-67 (5th Cir.), **cert. denied**, 516 U.S. 992 (1995); **Mann v. Scott**, 41 F.3d 968, 976 (5th Cir. 1994), **cert. denied**, 514 U.S. 1117 (1995); **Crank v. Collins**, 19 F.3d 172, 175 (5th Cir. 1994), **cert. denied**, 512 U.S. 1214 (1994); **Motley v. Collins**, 18 F.3d 1223, 1230 (5th Cir.), **cert. denied**, 513 U.S. 960 (1994).

[55] See **O'Dell v. Netherland**, 521 U.S. 151, 156 (1997)(holding that a "new rule" either "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final"); **Caspari v. Bohlen**, 510 U.S. at 390; **Matthew v. Johnson**, 201 F.3d at 359 (holding that the inquiry is whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule the defendants sought was required by the Constitution); **Vega v. Johnson**, 149 F.3d at 357; **Lucas v. Johnson**, 132 F.3d 1069, 1080-81 n.7 (5th Cir.), **cert. dismissed**, 524 U.S. 965 (1998); **White v. Johnson**, 79 F.3d 432, 437-38 (5th Cir.), **cert. denied**, 519 U.S. 911 (1996); **Davis v. Scott**, 51 F.3d at 459-60; **Mann v. Scott**, 41 F.3d at 976; **Crank v. Collins**, 19 F.3d at 175; **Motley v. Collins**, 18 F.3d at 1230.

conviction became final would have felt compelled by existing precedent to rule in his favor, a federal habeas court is barred from doing so on collateral review.[56] This non-retroactivity doctrine applies equally to a novel application of an old rule.[57] The only two exceptions to the **Teague** non-retroactivity doctrine are reserved for (1) new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense and (2) "watershed" rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, i.e., a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty.[58] A conviction becomes final for **Teague** purposes when either the United States Supreme Court denies a certiorari petition on the defendant's direct appeal or the time period for filing a certiorari petition expires.[59] Petitioner's

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[56] **Id.**

[57] See **Stringer v. Black**, 503 U.S. 222, 227-29 (1992); **Butler v. McKellar**, 494 U.S. 407, 414-15 (1990); **West v. Johnson**, 92 F.3d 1385, 1399 (5th Cir. 1996), **cert. denied**, 520 U.S. 1242 (1997); **Lackey v. Scott**, 52 F.3d at 100.

[58] See **O'Dell v. Netherland**, 521 U.S. at 157; **Graham v. Collins**, 506 U.S. 461, 478 (1993); **Matthew v. Johnson**, 201 F.3d at 369; **Muniz v. Johnson**, 132 F.3d 214, 225 (5th Cir.), **cert. denied**, 523 U.S. 1113 (1998); **Brown v. Cain**, 104 F.3d 744, 752 (5th Cir.), **cert. denied**, 520 U.S. 1195 (1997).

[59] See **Caspari v. Bohlen**, 510 U.S. at 390; **Ott v. Johnson**, 192 F.3d 510, 513 (5th Cir. 1999); **Felder v. Johnson**,

conviction became final on July 5, 1995, i.e., the date the United States Supreme Court denied petitioner's third certiorari petition.

D. Harmless Error Analysis

The test for harmless error in a federal habeas corpus action brought by a state prisoner is "whether the error had substantial and injurious effect or influence in determining the jury's verdict."[60]

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180 F.3d 206, 210 (5th Cir.), **cert. denied**, 120 S. Ct. 630 (1999); **Goodwin v. Johnson**, 132 F.3d 162, 179 n.13 (5th Cir. 1998); **Nichols v. Scott**, 69 F.3d 1255, 1264 (5th Cir. 1995), **cert. denied**, 518 U.S. 1022 (1996).

[60] See **Brecht v. Abrahamson**, 507 U.S. 619, 637 (1993); **Mayabb v. Johnson**, 168 F.3d 863, 868 (5th Cir.), **cert. denied**, 120 S. Ct. 409 (1999); **Goodwin v. Johnson**, 132 F.3d 162, 181 (5th Cir. 1997); **Woods v. Johnson**, 75 F.3d 1017, 1026 (5th Cir.), **cert. denied**, 519 U.S. 854 (1996) (holding that to satisfy the harmless error standard announced in **Brecht**, the defendant must show that there is more than a mere reasonable possibility that the error contributed to the verdict); **Cupit v. Whitley**, 28 F.3d 532, 538-59 (5th Cir. 1994), **cert. denied**, 513 U.S. 1163 (1995)(discussing the difference, for purposes of harmless error analysis, between structural and mere trial errors); **Ward v. Whitley**, 21 F.3d 1355, 1365 (5th Cir. 1994), **cert. denied**, 513 U.S. 1192 (1995); **Vanderbilt v. Collins**, 994 F.2d 189, 199 (5th Cir. 1993). However, the **Brecht** harmless error standard does not require that for the error to be harmful that there be a reasonable probability the result would have been different. See **Woods v. Johnson**, 75 F.3d at 1027 (citing **Kyles v.**

III. Analysis of the Claims

A. Failure to Instruct on Parole Eligibility

1. The Claim

In his first claims for relief, petitioner herein argues his constitutional rights under **Simmons v. South Carolina** were violated when the Texas trial court refused to instruct the jury at the punishment phase of petitioner's trial that, if given a life sentence, the petitioner would be eligible for release on parole in only twenty years.[61]

2. De Novo Review

a. No Merit

The Fifth Circuit has repeatedly rejected both due process and Eighth Amendment challenges to the refusal of Texas trial courts to instruct capital sentencing juries on the highly speculative impact of Texas parole law on a life sentence imposed on a criminal defendant convicted of capital

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Whitley, 514 U.S. 419, 434-36 (1995)). Likewise, if the court finds that the evidence on the question of the harmlessness of the error is evenly balanced, federal habeas relief must be granted. See **Woods v. Johnson**, 75 F.3d at 1026 (citing **O'Neal v. McAninch**, 513 U.S. 432, 436 (1995)).

[61] See Petitioner's Amended Petition, filed December 10, 1998, docket entry no. 15 (henceforth "Amended Petition"), at pp. 14-25; and Petitioner's Reply Memorandum, filed March 8, 1999, docket entry no. 19 (henceforth "Reply Memorandum"), at pp. 6-8.

murder.[62] There is no federal constitutional right to an instruction informing the jury regarding the possible impact of Texas parole law on a criminal defendant sentenced to serve a term of life imprisonment or inviting the jury to engage in speculation on such matters.[63] Neither petitioner's Fifth Amendment due process rights nor his Eighth Amendment rights were violated by the refusal of the Texas trial court to instruct his jury on Texas parole law.

b. **Teague** Foreclosure

Furthermore, application of the rule in **Simmons** to a jurisdiction such as Texas, when the Supreme Court specifically distinguished the Texas capital sentencing scheme in its opinion in **Simmons**, would extend the holding in **Simmons** far beyond the circumstances of that case as to violate the non-retroactivity doctrine of **Teague** because it would amount to the adoption in this federal habeas corpus proceeding of a "new rule" of constitutional procedure.[64]

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[62] See **Miller v. Johnson**, 200 F.3d 274, 290-91 (5th Cir. 2000); **Green v. Johnson**, 160 F.3d at 1044-45; **Muniz v. Johnson**, 132 F.3d at 224-25; **Johnson v. Scott**, 68 F.3d 106, 111-12 (5th Cir. 1995), **cert. denied**, 517 U.S. 1122 (1996); **Knox v. Collins**, 928 F.2d 657, 660 (5th Cir. 1991), **cert. denied**, 510 U.S. 1061 (1994); **Andrade v. McCotter**, 805 F.2d 1190, 1192 (5th Cir. 1986).

[63] **Id.**

[64] See **Green v. Johnson**, 160 F.3d at 1045 & n.16; **Muniz v. Johnson**, 132 F.3d at 224-25; **Johnson v. Scott**, 68 F.3d at 112 n.12. While petitioner's conviction became final for **Teague** purposes after the date of the Supreme Court's opinion in **Simmons**, as explained above, the

c. Harmless Error

Finally, any trial court error in failing to instruct petitioner's jury on Texas parole law at the punishment phase of petitioner's 1981 capital murder trial was harmless. At the time of his trial, petitioner was only 27 years of age. Petitioner argues that, under Texas parole law applicable to his capital offense, had he received a life sentence, he would have been eligible for release on parole not earlier than twenty years.[65]

In addition to the compelling evidence regarding petitioner's offense introduced at the guilt-innocence phase of petitioner's 1981 trial outlined above, petitioner's companion Rhonda Jean Bearden testified that, while watching a television news report on the murders in San Antonio, petitioner remarked that whoever had done the crime was "a

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opinion in **Simmons** specifically excepted jurisdictions such as Texas from the rule announced in that case. Extending **Simmons** to Texas would, therefore, constitute adoption of a "new rule" for **Teague** purposes. **See Green v. Johnson**, 160 F.3d at 1045 & n.16; **Muniz v. Johnson**, 132 F.3d at 224-25.

[65] At the time of both petitioner's offense and trial, Texas law provided that a criminal defendant convicted of capital murder and sentenced to death was not eligible for release on parole and that a defendant convicted of capital murder and sentenced to a term of imprisonment had to serve the lesser of either one third of his maximum sentence or twenty years before becoming eligible for release on parole. See *former* Article 42.12, § 15(b), TEX. CODE CRIM. PROC. ANN. (Vernon 1979).

cold blooded motherfucker" and then laughed.[66] Victoria Franklin, another of petitioner's female companions, testified petitioner showed no remorse when he described to her the details of his offense and corroborated Bearden's account of petitioner's response to the television news reports of the murders.[67]

At the punishment phase of petitioner's trial, there was considerable testimony regarding petitioner's post-arrest conduct. A jail guard named Joe Sawyer testified that on November 13, 1979, while he and another officer were attempting to return the petitioner to the jail from the hospital (1) petitioner went for Sawyer's gun and managed to get control of the gun, (2) during the struggle over the gun, petitioner twice pointed the gun at Sawyer and said "You may as well give up because I have the hammer back and I have control," (3) petitioner twice tried to pull the trigger of the revolver while it was pointed at Sawyer but Sawyer had his finger lodged behind the trigger, (4) both during and after the struggle over the gun, the petitioner also told Sawyer "I'll kill any white motherfucker, especially any cop that gets in my way," (5) Sawyer eventually regained control of the gun, but (6) as a result of the struggle, Sawyer sustained a torn rotator cuff in his right shoulder.[68] Ralph Vickrey, a Denver Colorado Deputy Sheriff testified that (1) in April 20, 1980, while awaiting extradition to Texas, petitioner seized a fire

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[66] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 279-80.

[67] See S.F. Trial, Volume 5, testimony of Victoria Franklin, at pp. 180, 185, and 192.

[68] See S.F. Trial, Volume 6, testimony of Joe Sawyer, at pp. 37-43.

extinguisher from the wall and attempted to strike a jail officer with same, (2) several guards attempted to restrain petitioner, (3) in the ensuing melee, petitioner was maced, one guard was struck in the face, and several other guards sustained minor cuts, (4) guards carried petitioner back to his cell and, as soon as they released petitioner, he struck a guard and said "If I ever get on the street, I'll get everyone of you," and (5) on another occasion, the petitioner told him that if he ever saw light, he would hurt someone to get out.[69] A hospital guard named Kenneth Hall testified that on June 19, 1980, he took petitioner to the hospital surgical clinic where (1) petitioner suddenly and without warning, produced a homemade weapon from the groin area, (2) petitioner stabbed Hall in the neck with sufficient force to penetrate all the way to Hall's spine, (3) Hall pushed petitioner away but petitioner approached Hall a second time, (4) petitioner backed off only after Hall pulled his weapon and shot the petitioner in the finger, and (5) as a result of the wound the petitioner inflicted, Hall was hospitalized.[70]

In the face of this uncontroverted testimony, at the punishment phase of petitioner's trial, the defense elicited testimony from petitioner's family and friends that petitioner (1) was a happy-go-lucky, non-violent person, (2) claimed to have found God, first in 1978-79 before his rape and robbery of an elderly woman and then again in March, 1980, just before petitioner's last two assaults on jail guards described above, (3) corresponded with, drew pictures for, and wrote

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[69] See S.F. Trial, Volume 6 , testimony of Ralph Vickrey, at pp. 16-18, 22, and 31-32.

[70] See S.F. Trial, Volume 6, testimony of Kenneth Hall, at pp. 71-80.

poetry to a fourteen-year-old suicidal girl, and thereby helped that girl, (4) was a talented artist and poet, (5) had attempted to bring other people to Christ, (6) had experienced a "normal" childhood as the fifth of nine children in a hard-working, middle-class, religious family in which both parents were present and his father, a federal government employee, was a strict disciplinarian, (7) lived on a farm where he had a pet horse and he and his siblings raised their own vegetables and a few hogs which the family slaughtered, (8) always ate well and played in a couple of the family's tree houses, (9) lived near his grandparents, (10) got along great with his fellow classmates, (11) was an excellent football player, but (12) nonetheless dropped out of high school his senior year and, shortly thereafter, was arrested and sent to the penitentiary at age eighteen.[71]

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[71] See S.F. Trial, Volume 6, testimony of Lee Griswold, at pp. 84-97; testimony of Linda Cowart, at pp. 98-102; testimony of Cynthia Parks Lee, at pp. 104-18; testimony of Hubert Holston, at pp. 119-24; testimony of Paquita Richardson, at pp. 126-40; testimony of Lillie Rex, at pp. 239-42; testimony of Norb Kabelitz, at pp. 243-71; and testimony of Wayne Bernard, at pp. 273-79.

The most extensive testimony on petitioner's behalf at the punishment phase of trial came from (1) petitioner's sister Paquita, who testified that (1) petitioner enjoyed an almost idyllic childhood in a "typical middle-class family atmosphere, (2) their parents were good, decent people, and (3) there were no terrible scars in their family life, see S.F. Trial, Volume 6, at pp. 126.40; petitioner's family Pastor Norb Kabelitz testified that (1) he had known petitioner's family since petitioner was eleven years old, (2) he knew petitioner's family well, (3) petitioner had

In rebuttal, the prosecution introduced uncontroverted testimony establishing that (1) on an occasion in January, 1979, a gun-wielding petitioner led two other men in a robbery of four elderly persons, (2) during the offense, petitioner threatened to kill all of his victims, and (3) petitioner's offense culminated in petitioner's rape of one of his female victims, who got a good look at petitioner.[72]

With all due respect, given (1) the heinous nature of petitioner's offense, (2) petitioner's relative youth at the time of trial, (3) petitioner's repeated acts of violence while in custody awaiting trial, (4) petitioner's failure to make any expression of sincere contrition for his crime, (5) petitioner's

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some difficulty reading that affected his self-image but petitioner was a well-behaved young man who got along well with his peers at school, (4) petitioner did witness several incidents of racial violence directed toward Blacks during the late-sixties and early-seventies when desegregation finally came to Oklahoma City, (5) petitioner did not tend toward violence at that time, and (6) since his arrest, petitioner had learned to face his pain without turning to drugs and to find outlets through his artistic talents, see **Id.**, testimony of Norb Kabelitz, at pp. 243-71; and, perhaps ironically, prosecution expert witness Dr. Robert Rast, who testified regarding the many psychological and psychiatric studies reporting the great difficulty experts in the mental health field experience attempting to predict future violence by incarcerated criminals, see **Id.**, testimony of Dr. Robert Rast, at pp. 222-25 and 230-31.

[72] See S.F. Trial, Volume 6, testimony of Mary Wilkinson, at pp. 171-82.

racist death threats to guards while in custody, and (6) the overwhelming weight of the evidence establishing petitioner's propensity for future violence, the trial court's failure to instruct the jury petitioner could be out of prison in only twenty years most certainly did not have a substantial and injurious effect or influence on the jury's verdict at the punishment phase of petitioner's trial. On the contrary, this Court concludes that, had the state trial court given the instruction petitioner now complains he was denied, it would have been tantamount to an instructed verdict for an affirmative finding on the second special sentencing issue regarding future dangerousness.

3. AEDPA Analysis

In the case of Norman Evans Green, Judge H.F. Garcia, writing for this Court, rejected precisely the same argument petitioner raises herein as his first claim for relief. The Fifth Circuit subsequently affirmed that decision in a published opinion in which it adopted not only Judge Garcia's reasoning but also much of the specific language in Judge Garcia's opinion as well.[73] For the reasons set forth in Judge Garcia's opinion in **Green**, as quoted by the Fifth Circuit, petitioner's initial claim for federal habeas relief herein does not establish petitioner's federal constitutional rights were violated by the state trial court's failure to instruct

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[73] See **Green v. Johnson**, 160 F.3d at 1044-45(rejecting equal protection, due process, and Eighth Amendment challenges to the failure to instruct a Texas capital sentencing jury on parole eligibility).

petitioner's jury on parole eligibility at the punishment phase of petitioner's trial:[74]

> Petitioner argues that the failure of his trial court to instruct the jury at the punishment phase of his trial prevented his jury from fully understanding the true nature of a life sentence under applicable Texas law and thus, violated the principle announced by the Supreme Court in **Simmons v. South Carolina**.[75] * * *
>
> Petitioner's reliance on **Simmons** is misplaced for a number of reasons. First, the Supreme Court took great pains in its opinion in **Simmons** to distinguish states such as Texas, which do not provide capital sentencing juries with an option of life without parole, from the scheme in South Carolina which required an instruction on parole ineligibility.[76] Second, the Fifth Circuit has repeatedly refused to extend the rule in Simmons beyond those situations in which a capital murder defendant is statutorily ineligible for parole.[77] * * *

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[74] **Green v. Johnson**, SA-94-CA-1008-HG (W.D. Tex. Dec. 23, 1997) at p. 114 (unpublished Memorandum Opinion and Order).

[75] 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994).

[76] See **Simmons v. South Carolina**, 512 U.S. at 168 & n.8.

[77] See **Johnson v. Scott**, 68 F.3d at 111-12; **Montoya v. Scott**, 65 F.3d at 416; **Allridge v. Scott**, 41 F.3d at 222;

Furthermore, the Supreme Court expressly noted in **Simmons** that when the state argues a defendant poses a continuing threat to not only free society but also to others within the prison setting, the concerns that underlie its opinion in that case are absent.[78] The prosecution introduced substantial evidence at the punishment phase of petitioner's trial showing petitioner had engaged in repeated acts of violence while in custody and had threatened to inflict more violence on his captors if he were ever released from custody and argued in closing argument at the punishment phase of petitioner's trial that this evidence established petitioner's propensity for future violence regardless of whether petitioner were incarcerated.[79] Thus, even disregarding the completely divergent parole systems applicable to Simmons and petitioner, petitioner's case is factually distinguishable from **Simmons**. The status of Texas parole law in 1981 did not constitute mitigating evidence at the punishment phase of petitioner's capital murder trial and petitioner was not entitled to a jury instruction regarding same at the punishment phase of his trial.[80]

Kinnamon v. Scott, 40 F.3d 731, 733 (5th Cir.), **cert. denied**, 513 U.S. 1054 (1994).

[78] See **Simmons v. South Carolina**, 512 U.S. at 165 n.5; **Allridge v. Scott**, 41 F.3d at 222 n.12(noting that Simmons argued that because his proclivity for violence was limited to assaulting only elderly women, he would not be a threat in prison).

[79] See S.F. Trial, Volume 6, at pp. 285-90 and 310-14.

[80] See **Green v. Johnson**, 160 F.3d at 1045; **Madden v. Collins**, 18 F.3d 304, 310 (5th Cir. 1994), **cert. denied**,

For the foregoing reasons, the Texas Court of Criminal Appeals' rejection of petitioner's first claim for relief herein in the course of petitioner's state habeas corpus proceeding was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's initial claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Regardless of whether this Court employs a de novo standard or the AEDPA's controversial standard of review, petitioner's first claim for federal habeas relief does not warrant same. In addition to lacking merit, this claim is barred not only by the **Teague** doctrine but also by the harmless error rule. The evidence of both the deliberateness of petitioner's offense and petitioner's future dangerousness was so overwhelming that a parole instruction informing the jury petitioner could be a free man in only twenty years would have virtually guaranteed affirmative answers to the Texas capital sentencing special issues. Moreover, the law in this Circuit is well-settled on this issue; petitioner is not entitled to a Certificate of Appealability on this issue.[81]

B. **Penry** and Quasi-**Penry** Claims

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513 U.S. 1156 (1995); **Andrade v. McCotter**, 805 F.2d at 1192-93.

[81] See **Miller v. Johnson**, 200 F.3d at 290-91(holding that the exact same claim asserted by petitioner herein as his first claim for relief did not warrant issuance of a CoA).

1. The Claims

In his second group of claims for relief herein, petitioner argues (1) the trial court erred in refusing to give a jury instruction at the punishment phase of petitioner's trial advising the jury it could consider and give mitigating effect to petitioner's evidence of his "mental disorder that prevented him from learning from his mistakes," troubled childhood, religious devotion, voluntary service, kindness to others, artistic and poetic talent, and close family ties and (2) the Texas capital sentencing scheme at the time of petitioner's trial effectively "chilled" the ability of petitioner's trial counsel to develop and introduce evidence showing petitioner had been the victim of sexual and physical abuse by his father and other siblings.[82]

2. De Novo Review

a. **Penry** Redraws the Legal Landscape

The first portion of petitioner's second group of claims are essentially arguments that petitioner was entitled to a special jury instruction at the punishment phase of his trial of the type mandated by the Supreme Court's opinion in **Penry** v. **Lynaugh**.[83]

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[82] See Amended Petition, at pp. 25-40; Reply Memorandum, at pp. 8-10.

[83] 492 U.S. 302 (1989). For a thorough history of the Supreme Court's opinion in **Penry** and the many Supreme Court and Fifth Circuit opinions that have construed the holding in **Penry**, see this Court's opinions in both **Cordova v. Johnson**, 993 F.Supp. 473, 496-500 (W.D. Tex.), **aff'd**, 157 F.3d 380 (5th Cir. 1998), **cert. denied**,

In **Penry**, decided June 26, 1989, almost eight years after the date the state trial court submitted its jury instructions at the punishment phase of petitioner's trial, the Supreme Court held the Texas capital sentencing scheme unconstitutional as applied to a defendant who had introduced evidence of his abusive childhood, organic brain damage, mental retardation, and resulting inability to learn from his mistakes.[84] More specifically, Penry had introduced evidence during his trial which established (1) he suffered from organic brain damage and mental retardation, (2) those conditions made it impossible for him to appreciate the wrongfulness of his conduct or to conform his conduct to the law, (3) when he was child, his mother frequently beat him over the head with a belt and routinely locked him in his room without access to the toilet for long periods of time, and (4) even the prosecution's experts agreed the defendant's extremely limited mental ability rendered him unable to learn from his mistakes.[85] The Supreme Court subsequently explained it

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525 U.S. 1131 (1999); **Adanandus v. Johnson**, 947 F.Supp. 1021, 1039-41 (W.D. Tex. 1996), **aff'd**, 114 F.3d 1181 (5th Cir. 1997) [Table].

[84] See **Penry v. Lynaugh**, 492 U.S. at 309-10.

[85] **Id.** In addition, Penry introduced evidence that (1) he was unable to learn in school and never finished the first grade, (2) he suffered brain damage, probably caused at birth but which may have been caused by beatings and multiple injuries to his brain at an early age, (3) his mother frequently beat him over the head with a belt when he was a child, (4) he was routinely locked in his room without access to a toilet for long periods of time, (5) his aunt struggled for over a year to teach him to print his

considered the foregoing evidence to be "mitigating" because it indicated the defendant suffered from a diminished ability to control his impulses or to evaluate the consequences of his conduct and therefore reduced his moral culpability.[86] The Supreme Court majority concluded in **Penry** that in answering the three special issues submitted to it during the punishment phase of trial,[87] Penry's Texas jury had not been

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name, and (6) as a youngster, he was in and out of state schools and hospitals until age twelve. **Id.**

[86] See **Graham v. Collins**, 506 U.S. 461, 473 (1993) (quoting **Penry v. Lynaugh**, 492 U.S. at 322).

[87] At the time of petitioner's capital murder trial in October, 1989, the Texas capital sentencing procedure called for a bifurcated trial in which the guilt or innocence phase of the trial occurred prior to any consideration of punishment by the jury. In the event the jury found the defendant guilty of capital murder, the same jury would remain empaneled and the punishment phase of the trial would proceed. See TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981). At that time, the Texas capital sentencing statute directed the trial court to submit the following issues to the jury at the punishment phase of the capital trial:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

able to consider and give effect to all of Penry's mitigating evidence "without any jury instructions on mitigating evidence.[88] Therefore, the Supreme Court concluded Penry was constitutionally entitled to further instructions informing the jury it could consider and give effect to his evidence by declining to impose the death penalty.[89]

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(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Also at the time of the petitioner's trial, the Texas capital sentencing statute directed the trial court to instruct the jury that "(1) it may not answer any issue 'yes' unless it agrees unanimously; and (2) it may not answer any issue 'no' unless 10 or more jurors agree." See TEX. CODE CRIM. PROC. ANN. art. 37.071(d) (Vernon 1981). The Texas capital sentencing statute also provided as follows:

If the jury returns an affirmative finding on each special issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

See TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981) (emphasis added).

[88] See **Graham v. Collins**, 506 U.S. 461, 474-75 (1993) (quoting **Penry v. Lynaugh**, 492 U.S. at 322).

[89] See **Graham v. Collins**, 506 U.S. at 474 (quoting **Penry v. Lynaugh**, 492 U.S. at 328). For a discussion of

In several subsequent decisions, however, the Supreme Court has taken great pains to narrowly circumscribe its holding in **Penry**.[90] In **Graham** v. **Collins**, the Supreme Court held its opinion in **Penry** should not be construed as broadly suggesting the invalidity of the Texas special issue framework and held Graham's sentencing jury could give adequate consideration, without the necessity of a

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the Supreme Court's holding in **Jurek v. Texas**, 428 U.S. 262 (1976), and the relationship between that opinion and the holding in **Penry**, see **Adanandus v. Johnson**, 947 F.Supp. at 1039-41.

[90] See **Arave v. Creech**, 507 U.S. 463, 470-71 (1993) (holding that to satisfy the Eighth and Fourteenth Amendments, a capital sentencing scheme must suitably direct and limit the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action and that the limits on the sentencer's discretion must constitute clear and objective standards that provide "specific and detailed guidance" and make rationally reviewable the process for imposing the death penalty); **Saffle v. Parks**, 494 U.S. 484, 491-93 (1990) (holding that within certain parameters, the State is free to channel or focus the jury's consideration of the defendant's mitigating evidence and emphasizing that "above all, capital sentencing must be reliable, accurate, and nonarbitrary"); **Boyde v. California**, 494 U.S. 370, 380 (1990) (holding that a defendant must show more than that a capital sentencing scheme might have resulted in the jury being prevented from considering mitigating evidence of the defendant's character and background; the petitioner must show a reasonable likelihood that such actually occurred).

Penry instruction, to Graham's mitigating evidence of his youth, good character traits, efforts to be a responsible father, non-violent and religious nature, and unstable family background.[91] In **Johnson v. Texas**,[92] the Supreme Court upheld a Texas prisoner's capital murder conviction and death sentence against a claim that the former Texas capital murder statute precluded the jury from considering and giving effect to mitigating evidence of the defendant's youth at the time of his offense.[93] Thus, while the Supreme Court has emphasized in its post **Penry** opinions the broad scope of potentially mitigating evidence that a Texas capital sentencing jury may adequately consider without the necessity of a **Penry** instruction, that Court has taken great pains not to require

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[91] See **Graham v. Collins**, 506 U.S. at 475-77. Significantly, in **Graham**, the Supreme Court rejected the suggestion that a **Penry** instruction was constitutionally mandated whenever a capital murder defendant offered mitigating evidence that had some arguable relevance beyond the Texas special sentencing issues. **Id.**

[92] 509 U.S. 350 (1993) .

[93] See **Johnson v. Texas**, 509 U.S. 350 (1993). The Supreme Court emphasized in **Johnson** that its previous opinions do not require that "a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant." **Id.** at 371-72. However, the Supreme Court's opinion in **Johnson** includes a lengthy discussion regarding the inherently mitigating nature of evidence that the defendant was young or immature at the time of the capital offense. See **Johnson v. Texas**, 509 U.S. at 367-70.

explicit consideration of all evidence which might arguably possess some potential mitigating value.[94]

Contrary to the suggestions implicit in petitioner's second group of claims for relief herein, neither before nor after **Penry** has the Supreme Court ever recognized any broad-ranging Eighth Amendment right to either (1) compel a capital sentencing authority to consider any and all manner of evidence which a capital murder defendant considers "relevant" in an abstract sense when deciding whether to impose the death penalty or (2) require the sentencing authority to consider an emotional appeal based on purportedly mitigating evidence. In **Lockett v. Ohio**, the Supreme Court plurality expressly acknowledged the "traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."[95] In **Skipper v South Carolina**, the Supreme Court majority specifically disavowed the suggestion that "all facets of the defendant's ability to adjust to prison life must be treated as relevant and

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[94] See **Johnson v. Texas**, 509 U.S. at 371-72 (rejecting the contention that a **Penry** instruction is necessary in every case in which the defendant offers mitigating evidence that has some arguable relevance beyond the special issues and emphasizing that its previous opinions do not require that a jury be able to dispense mercy on the basis of a sympathetic response to the defendant); **Graham v. Collins**, 506 U.S. at 476 (rejecting the contention that a **Penry** instruction is necessary in every case in which the defendant offers mitigating evidence that has some arguable relevance beyond the special issues).

[95] **Lockett v. Ohio**, 438 U.S. at 604 n.12.

potentially mitigating."[96] In **California v. Brown**,[97] a Supreme Court plurality upheld as constitutional a capital sentencing jury instruction which directed the jury not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling.[98] In **Franklin v. Lynaugh**,[99] a majority of Supreme Court justices agreed that (1) a capital sentencing authority is not constitutionally required to give consideration to "residual doubts" about the defendant's innocence because such matters are relevant to neither the defendant's character or record nor the circumstances of the offense[100] and (2) the Texas capital sentencing special issue regarding future dangerousness affords the sentencing jury adequate opportunity to consider a capital murder defendant's evidence of his good behavior in prison[101] In **Saffle v. Parks**, the Supreme Court upheld as

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[96] **Skipper v. South Carolina**, 476 U.S. at 7 n.2.

[97] 479 U.S. 538 (1987).

[98] **California v. Brown**, 479 U.S. at 542-43.

[99] 487 U.S. 164 (1988).

[100] See **Franklin v. Lynaugh**, 487 U.S. at 172-74 (plurality opinion of Justice White, joined by the Chief Justice and Justices Scalia and Kennedy); **Franklin v. Lynaugh**, 487 U.S. at 188 (concurring opinion of Justices O'Connor and Blackmun concluding that "residual doubts" is neither relevant to the defendant's character nor the circumstances of the offense).

[101] **Franklin**, 487 U.S. at 177-80. The concurring Justices agreed with this treatment of Franklin's meager evidence regarding his good behavior in prison. **Id.** at 184-87(O'Connor and Blackmun concurring).

constitutional a jury instruction directing a capital sentencing jury to "avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence"[102] and held the Constitution does not require that the jury be allowed to consider and make a purely emotional response to mitigating evidence.[103] In **Tuilaepa v. California**,[104] the Supreme Court distinguished the two aspects of the capital decision-making process, i.e., the eligibility decision and the selection process, and emphasized that, while both inquiries necessarily involve resolution of issues that bear a factual nexus to the crime, the selection process must also focus on the character and record of the defendant.[105] In **Buchanan v. Angelone**,[106] the Supreme

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[102] See **Saffle v. Parks**, 494 U.S. at 489-94. "The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice. **Id.** at 493.

[103] **Id.** at 494.

[104] 512 U.S. 967 (1994).

[105] See **Tuilaepa v. California**, 512 U.S. at 971-73. **Tuilaepa** is significant to the jurisprudence of Eighth Amendment claims because it represents the first time that the Supreme Court set forth a comprehensive analytical approach to Eighth Amendment claims. Equally significant is the fact that although there were several separate concurring opinions joining Justice Kennedy's opinion for the Court, six of the Justices appeared to agree on the propriety of the analytical framework set forth by Justice Kennedy. **Tuilaepa** holds that the Eighth Amendment address two different but related aspects of

capital sentencing: the eligibility decision and the selection decision. Id. at 971. The Supreme Court's analysis of those aspects of capital sentencing provides the first clear insight into a comprehensive system for analyzing Eighth Amendment claims:

To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. The aggravated circumstance may be contained in the definition of the crime or in a separate sentencing factor (or both). As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague.***

We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection state is an individualized determination on the basis of the character of the individual and the circumstances of the crime." That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.

512 U.S. at 971-73 (citations omitted).

Court reaffirmed the vitality of the two-stage **Tuilaepa** analysis and rejected an argument that the Constitution mandates jury instructions at the selection stage of a capital sentencing proceeding regarding the nature of mitigating evidence or the manner in which the sentencing jury is to consider specific statutorily-defined mitigating factors, such as the defendant's age, lack of prior criminal activity, extreme emotional or mental disturbance, and significantly impaired capacity to appreciate the criminality of his conduct.[107]

The first part of the **Tuilaepa** analysis, i.e., the eligibility decision, was discussed by the Supreme Court in **Loving v. United States**.[108]

> The Eighth Amendment requires, among other things, that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Some schemes accomplish that narrowing by requiring that

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[106] 522 U.S. 269 (1998).

[107] See **Buchanan v. Angelone**, 522 U.S. at 275-79. The Supreme Court's opinion in **Buchanan** emphasizes that the issue of proportionality in capital sentencing is to be addressed in the eligibility phase of a capital sentencing proceeding, wherein that court has stressed the need for channeling and limiting the jury's discretion to ensure the death penalty is not arbitrarily or capriciously imposed. **Id.** at 275-78.

[108] 517 U.S. 748 (1996).

> the sentencer find at least one aggravating circumstance. The narrowing may also be achieved, however, in the definition of the capital offense, in which circumstance the requirement that the sentencer "find the existence of the aggravating circumstance in addition is no part of the constitutionally required narrowing process."[109]

Under the Texas capital sentencing scheme, this constitutionally mandated narrowing function is performed at the guilt-innocence phase of trial.[110] It is in the selection phase that a sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence.[111] Therefore, this Court's analysis of the petitioner's claims regarding

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[109] 517 U.S. 748 (1996) (citations omitted). The Supreme Court's opinion in **Buchanan v. Angelone** includes a further elaboration on the distinction between the narrowing function or eligibility decision and the selection phase of a capital sentencing proceeding. See **Buchanan v. Angelone**, 522 U.S. at 275-78.

[110] See **Johnson v. Texas**, 509 U.S. at 362 (holding that its previous opinions upholding the Texas capital sentencing scheme found no constitutional deficiency in the means used to narrow the group of offenders subject to capital punishment because the statute itself adopted five different classifications of murder for that purpose); **Lowenfield v. Phelps**, 484 U.S. 231, 243-47 (1988); **Jurek v. Texas**, 428 U.S. at 268-75; **West v. Johnson**, 92 F.3d at 1406; **Woods v. Johnson**, 75 F.3d at 1033-34.

[111] See **Buchanan v. Angelone**, 522 U.S. at 275-78.

mitigating evidence must focus on the second aspect of the **Tuilaepa** analysis.

b. Subsequent Treatment of **Penry** Mitigating Evidence

In the wake of **Penry** and the other Supreme Court opinions summarized above, both the Supreme Court and the Fifth Circuit have addressed a wide range of constitutional challenges to individual applications of the Texas capital sentencing scheme. From those opinions, it is possible to discern an approach to the subject of mitigating evidence. The Supreme Court and Fifth Circuit have each emphasized that a jury in a capital murder trial must be permitted to examine the defendant's character and record, as well as the circumstances of the particular offense in determining whether to impose the death penalty:

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[112]

Therefore, a sentencing jury in a capital murder trial may not be prevented from considering any mitigating evidence presented by the defendant which relates to the defendant's character or record or the circumstances of the

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[112] **Lockett v. Ohio**, 438 U.S. at 604; **Sawyers v. Collins**, 986 F.2d 1493, 1497 (5th Cir. 1992), **cert. denied**, 508 U.S. 933 (1993)(both quoting **Woodson v. North Carolina**, 428 U.S. at 304).

offense.[113] In other words, the jury at petitioner's trial must have been afforded adequate opportunity to give effect to petitioner's mitigating evidence of his character and background, as well as his evidence of the circumstances surrounding his offense.

The Fifth Circuit has held that a **Penry** instruction is only required in those instances in which the major mitigating thrust of the evidence is substantially beyond the scope of all the special issues under the Texas capital sentencing scheme.[114] The Fifth Circuit has recognized a wide range of

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[113] See **Buchanan v. Angelone**, 522 U. S. at 275-78; **Eddings v. Oklahoma**, 455 U.S. at 113-17; **Sawyers v. Collins**, 986 F.2d at 1497. However, the Fifth Circuit's opinion in **Sawyers** must be read in conjunction with the Supreme Court's more recent opinions addressing the former Texas capital sentencing statute. See **Johnson v. Texas**, 509 U.S. at 372-73 (rejecting the contention that a **Penry** instruction is necessary in every case in which the defendant offers mitigating evidence that has some arguable relevance beyond the special issues and emphasizing that its previous opinions do not require that a jury be able to dispense mercy on the basis of a sympathetic response to the defendant); **Graham v. Collins**, 506 U.S. at 476(rejecting the contention that a **Penry** instruction is necessary in every case in which the defendant offers mitigating evidence that has some arguable relevance beyond the special issues).

[114] See **Nethery v. Collins**, 993 F.2d 1154, 1161 (5th Cir. 1993), **cert. denied**, 511 U.S. 1026 (1994); **Bridge v. Collins**, 963 F.2d 767, 770 (5th Cir. 1992), **cert. denied**, 509 U.S. 925 (1993); **Holland v. Collins**, 962 F.2d 417, 419-20 (5th Cir. 1992), **cert. denied**, 509 U.S. 925

potentially mitigating evidence can be considered within the scope of the Texas capital sentencing special issues without the necessity for a **Penry** instruction.[115] The Supreme Court

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(1993); **White v. Collins**, 959 F.2d 1319, 1322 (5th Cir.), **cert. denied**, 503 U.S. 1001 (1992); **Barnard v. Collins**, 958 F.2d 634, 637 (5th Cir. 1992), **cert. denied**, 506 U.S. 1057 (1993); **Graham v. Collins**, 950 F.2d 1009, 1030-33 (5th Cir. 1992),(en banc), **aff'd**, 506 U.S. 461 (1993).

[115] See **Robison v. Johnson**, 151 F.3d at 266 (evidence the defendant had a history of drug and alcohol abuse and suffered from hereditary schizophrenia that was treatable and episodic in nature); **Lucas v. Johnson**, 132 F.3d at 1082 (evidence the defendant was psychotic and suffered from schizophrenia but responded well to anti-psychotic drugs like Thorazine and could be treated in a controlled environment); **Tucker v. Johnson**, 115 F.3d 276, 281-82 (5th Cir.), **cert. denied**, 522 U.S. 1017 (1997) (evidence of the defendant's youth, intoxication at the time of the offense, and chronic drug and alcohol abuse which resulted in arrested emotional development); **Turner v. Johnson**, 106 F.3d 1178, 1189 (5th Cir. 1997) (evidence of the defendant's youth and good behavior during pretrial detention); **West v. Johnson**, 92 F.3d at 1405 (the defendant's testimony that he had been drinking and was intoxicated and his confession that he had "blown up" in response to his victim's verbal statements); **Nichols v. Scott**, 69 F.3d 1255, 1267-68 & 1278 (5th Cir. 1995), **cert. denied**, 518 U.S. 1022 (1996) (evidence the defendant was not the triggerman and evidence showing the defendant's good character); **Briddle v. Scott**, 63 F.3d 364, 377 (5th Cir.), **cert. denied**, 516 U.S. 1033 (1995) (evidence of the defendant's remorse and voluntary intoxication at the time of his offense); **Davis v. Scott**, 51

F.3d 457, 462-65 (5th Cir.), **cert. denied**, 516 U.S. 992 (1995) (evidence the defendant suffered from schizophrenia, psychotic disorders, and violent sexual proclivities); **Lackey v. Scott**, 28 F.3d 486, 489 (5th Cir. 1994), **cert. denied**, 513 U.S. 1086 (1995) (evidence of the defendant's intoxication); **Crank v. Collins**, 19 F.3d 172, 175 (5th Cir.), **cert. denied**, 512 U.S. 1214 (1994) (evidence of the defendant's good character); **Nethery v. Collins**, 993 F.2d at 1161 (evidence of the accused's voluntary intoxication); **James v. Collins**, 987 F.2d 1116, 1121-22 (5th Cir.), **cert. denied**, 509 U.S. 947 (1993)(evidence of the accused's voluntary intoxication, impoverished and abusive family history, redeeming character traits, including his remorse for his actions, his cooperation with law enforcement authorities, and his positive familial ties); **Jernigran v. Collins**, 980 F.2d 292, 295 (5th Cir. 1992), **cert. denied**, 508 U.S. 978 (1993) (evidence the defendant was a kind, gentle person who had rededicated his life to God); **Stewart v. Collins**, 978 F.2d 199, 201 (5th Cir. 1992), **cert. denied**, 507 U.S. 1053 (1993) (evidence that the defendant was not the triggerman); **Demouchette v. Collins**, 972 F.2d 651, 653-54 (5th Cir.), **cert. denied**, 505 U.S. 1246 (1992)(evidence the defendant suffered from antisocial personality disorder); **Cantu v. Collins**, 967 F.2d 1006, 1012-13 (5th Cir. 1992), **cert. denied**, 509 U.S. 926 (1993) (evidence of the defendant's youth); **Drew v. Collins**, 964 F.2d 411, 420-21 (5th Cir. 1992), **cert. denied**, 509 U.S. 925(1993) (evidence the defendant had a troubled childhood, had a chronic drinking problem, was under the influence of alcohol and marijuana at the time he committed the crime, was only 23 years old at the time of the offense, and did not strike the fatal blow); **Bridge v. Collins**, 963 F.2d 767, 769-70 (5th Cir. 1992), **cert.**

denied, 509 U.S. 925 (1993) (evidence the defendant's accomplice actually shot the victim, the defendant was intoxicated at the time of the offense, the defendant did not plan the robbery, the defendant was operating under influence of others during the offense, the defendant expressed extreme remorse following the offense, the defendant was young and immature at the time of the offense, and had no previous history of violence); **Holland v. Collins**, 962 F.2d 417, 419-20 (5th Cir. 1992), **cert. denied**, 509 U.S. 925 (1993)(evidence of the defendant's positive personality traits); **Black v. Collins**, 962 F.2d 394, 404-05 (5th Cir.), **cert. denied**, 504 U.S. 992 (1992) (evidence of defendant's good character, military service, and work with the Boy Scouts); **White v. Collins**, 959 F. 2d 1319, 1324 (5th Cir.), **cert. denied**, 503 U.S. 1001 (1992) (evidence of the defendant's youthful age at the time of his offense); **Lincecum v. Collins**, 958 F.2d 1271, 1282-84 (5th Cir.), **cert. denied** 506 U.S. 957 (1992) (evidence of the accused's troubled childhood and his emotional turmoil at the time of his offense); **Barnard v. Collins**, 958 F.2d 634, 638-39, (5th Cir. 1992), **cert. denied**, 506 U.S. 1057 (1993) (defendant's evidence of his head injury, troubled childhood, drug and alcohol abuse, good character, work history, carpentry skills, and familial responsibility and support); **Cordova v. Collins**, 953 F.2d 167, 170 (5th Cir.), **cert. denied**, 502 U.S. 1067 (1992) (defendant's testimony of his voluntary intoxication at the time of his offense); **Graham v. Collins**, 950 F.2d 1009, 1032-33 (5th Cir. 1992)(en banc), **aff'd**, 506 U.S. 461, (1993) (evidence that the defendant was of a normal or good character, respected his mother and stepfather, cared for and was close to his mother, was never violent, never had weapons, helped out around the house without being

and Fifth Circuit have each held the Texas capital sentencing special issues allow adequate consideration of the mitigating effects of evidence of a defendant's youth so as to negate the necessity for a **Penry** instruction on such evidence.[116] Likewise, the Fifth Circuit has repeatedly held the Texas capital sentencing special issues are sufficiently broad to permit adequate consideration of evidence the accused was voluntarily intoxicated at the time of his offense.[117] The Fifth

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asked, went to school and church regularly, loved "The Lord", and worked and contributed to the support of his two children); **Green v. Collins**, 947 F.2d 1230, 1232 (5th Cir.), **cert. denied**, 502 U.S. 954 (1991)(evidence the defendant was a good worker, had been a foreman, would have been re-employed by his former employer had he not been incarcerated, was highly intelligent, optimistic, and had the mental capacity to address small details).

[116] See **Johnson v. Texas**, 509 U.S. at 365-70; **Tucker v. Johnson**, 115 F.3d at 281-82; **Turner v. Johnson**, 106 F.3d at 1189; **Drew v. Collins**, 964 F.2d at 420-21; **Barnard v. Collins**, 958 F.2d at 637-38; **Wilkerson v. Collins**, 950 F.2d 1054, 1060-61 (5th Cir. 1992), **cert. denied**, 509 U.S. 921 (1993); **Graham v. Collins**, 950 F.2d at 1030-32.

[117] See **Turner v. Johnson**, 115 F.3d at 281-82; **West v. Johnson**, 92 F.3d at 1405; **Briddle v. Scott**, 63 F.3d at 377; **Lackey v. Scott**, 28 F.3d at 489; **Anderson v. Collins**, 18 F.3d at 12-13 n.5; **Nethery v. Collins**, 993 F.2d at 1161; **James v. Collins**, 987 F.2d at 1121; **Sawyers v. Collins**, 986 F.2d at 1502 n.14; **Drew v. Collins**, 964 F.2d at 420; **Bridge v. Collins**, 963 F.2d at 770; **Barnard v. Collins**, 958 F.2d at 639; **Cordova v. Collins**, 953 F.2d at 170; and **Graham v. Collins**, 950

Circuit has also repeatedly held a Texas capital sentencing jury may give adequate consideration to evidence showing a defendant neither fired the fatal shot nor delivered the fatal blow without the necessity of a **Penry** instruction.[118] Thus, evidence of such matters does not require any special jury instructions; Texas sentencing juries can adequately consider these types of evidence without the necessity of supplemental jury instructions like those mandated by **Penry**.

Consistent with the Supreme Court opinions summarized above, the Fifth Circuit has also held that to constitute relevant mitigating evidence for **Penry** purposes, evidence of a defendant's background and character must relate to and diminish the defendant's moral culpability for the offense with which he is charged.[119] Thus, the first inquiry

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F.2d at 1029. In each of these opinions, the Fifth assumed without analysis that evidence of the defendant's voluntary intoxication at the time of his offense fell within the parameters of constitutionally relevant mitigating evidence.

[118] See **Nichols v. Scott**, 69 F.3d at 1267-68; **Stewart v. Collins**, 978 F.2d at 201; **Drew v. Collins**, 964 F.2d at 420-21; **Bridge v. Collins**, 963 F.2d at 769-70.

[119] See **Jones v. Johnson**, 171 F.3d 270, 275-76 (5th Cir.), **cert. denied**, 120 S. Ct. 29 (1999)(holding that evidence of low intelligence, including mild retardation, did not warrant a **Penry** instruction where it was not accompanied by a showing of a nexus between that handicap and the criminal act); **Turner v. Johnson**, 106 F.3d at 1189 (holding that "for evidence to have mitigating relevance, there must be a nexus between the mitigating evidence and the criminal act); **Harris v. Johnson**, 81 F.3d 535,

539 (5th Cir.), **cert. denied**, 517 U.S. 1227 (1996)(holding that no **Penry** instruction was necessary where there was no evidence showing that the defendant's borderline intelligence bore a nexus to his criminal actions); **Allridge v. Scott**, 41 F.3d 213, 223 (5th Cir. 1994), **cert. denied**, 514 U.S. 1108 (1995)(holding that no **Penry** instruction was necessary in the absence of evidence showing that the defendant's criminal conduct was attributable to the mental illness and abuse the had defendant suffered during a previous incarceration); **Lackey v. Scott**, 28 F.3d at 489(holding that evidence of the defendant's low intelligence and history of childhood abuse was not relevant for **Penry** purposes where there was no evidence showing the defendant's criminal act was attributable to same); **Madden v. Collins**, 18 F.3d 304, 307-08 (5th Cir. 1994) **cert. denied**, 513 U.S. 1156 (1995)(holding that evidence the defendant suffered from an anti-social personality, dyslexia, and a troubled childhood was not relevant for **Penry** purposes absent a showing that the defendant's criminal conduct was attributable to same); **Russell v. Collins**, 998 F.2d 1287, 1292-93 (5th Cir. 1993), **cert. denied**, 510 U.S. 1185 (1994)(holding that evidence of a single instance of physical abuse by the petitioner's stepfather did not constitute relevant mitigating evidence when unaccompanied by any other evidence showing that the incident left the petitioner mentally or emotionally impaired or more predisposed to commit murder); **Barnard v. Collins**, 958 F.2d at 638-39(holding that, in order to warrant a **Penry** instruction, evidence that a defendant had a troubled childhood must be accompanied by evidence that the defendant's childhood experiences had a psychological effect on the defendant, i.e., that the defendant's criminal conduct was attributable to his

in a **Penry** claim is whether the mitigating evidence is relevant, i.e., does the evidence implicate the basic concern of **Penry** that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.[120] In order to meet this relevance

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disadvantaged background); **Graham v. Collins**, 950 F. 2d at 1033 (holding that "mitigating" evidence must be able to raise an inference "that the crime is attributable to the disability"); see also **Barnard v. Collins**, 958 F.2d at 639 (holding that evidence from lay witnesses that the defendant had a drinking problem and was intoxicated at the time of his offense was insufficient to permit the jury to conclude that the defendant therein suffered from alcoholism or drug addiction or some other "uniquely severe permanent handicap" through no fault of his own).

[120] In both **Penry v. Lynaugh** and **Buchanan v. Angelone**, the Supreme Court addressed situations in which a capital murder defendant had presented evidence at trial that he had suffered extensive physical or emotional child abuse and expert testimony which directly linked the defendant's troubled childhood to the specific capital murder with which the defendant was charged. See **Penry v. Lynaugh**, 492 U.S. at 307-10; **Buchanan v. Angelone**, 522 U.S. at 271-72. While a rational jury may infer that evidence of a long-standing pattern of severe physical or emotional abuse inflicted upon a child of tender years renders that child less morally culpable for a violent crime, isolated episodes of violence or physical abuse inflicted upon a defendant do not, standing alone, constitute relevant mitigating evidence because there is no inherent nexus between such isolated episodes and the capital offense. See **Russell v. Collins**, 998 F.2d at 1292-

standard, the evidence must show (1) a uniquely severe, permanent handicap with which the defendant is burdened through no fault of his own and (2) the criminal act was attributable to this severe, permanent condition.[121] A properly preserved **Penry** claim will only prove meritorious if two requirements are met: first, the evidence proffered at trial must actually be "mitigating," i.e., it must relate to the defendant's character or background or to the circumstances of the offense and be sufficient to lead a reasonable juror to impose a penalty less than death, and second, the evidence proffered at trial must have been beyond the "effective reach" of the jury, i.e., there must be a reasonable likelihood the jury applied the Texas special issues in a way which prevented consideration of the constitutionally relevant mitigating evidence.[122] A failure to satisfy either prong of this analysis renders a **Penry** claim meritless.

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93. Thus, absent evidence showing that extreme, severe, or sustained mental or physical abuse was inflicted upon a capital murder defendant during childhood, a defendant asserting a history of child abuse in mitigation at sentencing, the defendant must come forward with expert testimony or other evidence directly linking his or her capital offense to some form of physical, mental, or emotional abuse the defendant suffered as a child. **Id.**

121 See **Tucker v. Johnson**, 115 F.3d at 281; **Turner v. Johnson**, 106 F.3d at 1189; **Harris v. Johnson**, 81 F.3d at 539; **Davis v. Scott**, 51 F.3d at 460; **Russell v. Collins**, 998 F.2d at 1292-93.

122 **Turner v. Johnson**, 106 F.3d at 1189; **Madden v. Collins**, 18 F.3d at 308; **Russell v. Collins**, 998 F.2d at 1292-93.

Furthermore, **Penry** does not require that a sentencer be able to give effect to a defendant's mitigating evidence in whatever manner or to whatever extent the defendant desires.[123] A jury need only be provided one fair vehicle for considering mitigating evidence.[124] The State can "structure" the jury's consideration of mitigating evidence as long as it does not prevent the jury from giving effect to any constitutionally relevant mitigating evidence.[125] Finally, a defendant is entitled to a **Penry** instruction only with regard to evidence that was actually introduced or offered at trial; a petitioner may not base a **Penry** claim on evidence that could have been, but was not, proffered at trial.[126]

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[123] **Marquez v. Collins**, 11 F.3d 1241, 1248 (5th Cir.), **cert. denied**, 513 U.S. 881 (1994); **White v. Collins**, 959 F.2d 1319, 1322 (5th Cir., **cert. denied**, 503 U.S. 1001 (1992).

[124] **Harris v. Collins**, 990 F.2d 185, 189 (5th Cir.), **cert. denied**, 509 U.S. 933 (1993); **White v. Collins**, 959 F.2d at 1322-23.

[125] See **Buchanan v. Angelone**, 522 U.S. at 276; **Johnson v. Texas**, 509 U.S. at 362; **Boyde v. California**, 494 U.S. at 377; **Rogers v. Scott**, 70 F.3d 340, 343 (5th Cir. 1995), **cert. denied**, 517 U.S. 1235 (1996).

[126] See **West v. Johnson**, 92 F.3d at 1405; **Briddle v. Scott**, 63 F.3d at 377; **Allridge v. Scott**, 41 F.3d at 223; **Crank v. Collins**, 19 F.3d at 176; **Anderson v. Collins**, 18 F.3d at 1214-15; **Calling v. Collins**, 998 F.2d at 275; **Barnard v. Collins**, 958 F.2d at 637; **Wilkerson v. Collins**, 950 F.2d at 1061; **May v. Collins**, 904 F.2d at 232; **DeLuna v. Lynaugh**, 890 F.2d at 722. Thus, petitioner is not entitled to rely upon evidence regarding his psychological and psychiatric history that was developed during his state

c. The **Penry** Evidence

The initial problem with petitioner's **Penry** claims is that the purported **Penry** evidence actually introduced at his trial is somewhat different than claimed in this proceeding. There was no evidence introduced showing petitioner suffered from any "mental disorder that prevented him from learning from his mistakes." At petitioner's 1981 trial, there was no psychiatric or psychological testimony introduced regarding the results of any mental health or intellectual examination of petitioner. Dr. Robert Rast, the sole mental health expert who testified at petitioner's trial, candidly admitted he had never examined petitioner, had not reviewed any of petitioner's mental health records, and knew absolutely nothing about petitioner's background or history.[127]

Dr. Rast did testify extensively on direct examination by the prosecution regarding the characteristics of persons labeled by mental health professionals as "sociopaths" or, to employ a more modern term, persons experiencing "anti-social personality disorder."[128] However, Dr. Rast did not testify petitioner was, in fact, such a person. On the contrary, the focus of Dr. Rast's testimony on direct examination was the issue of whether a hypothetical person who had engaged

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habeas corpus proceeding for the purpose of urging his **Penry** claims herein. Moreover, petitioner does not allege that his trial counsel rendered ineffective assistance by failing to investigate, develop, or present at trial any additional evidence regarding petitioner's mental health.

[127] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast, at pp. 209-10.

[128] **Id.** at pp. 201-09.

in many of the same types of violent, criminal activities the prosecution claimed petitioner had committed would be likely to continue to commit harmful acts to others in the future.[129]

It is true that, in the course of describing the characteristics of persons whom mental health professionals label as sociopathic, Dr. Rast did testify as follows:

> It's a person who does not learn from previous experience. It's one who has shallow affect. It's one who has no conscience or don't [sic] care, highly manipulative person, a con artist, self-centered, egocentric. These are the terms that apply to most sociopaths.[130]

However, Dr. Rast offered no testimony, and petitioner offered no evidence showing petitioner had ever been diagnosed as suffering from any intellectual defect or mental disease which prevented him from learning from his mistakes, as opposed to falling within Dr. Rast's description of a sociopathic personality who simply does not wish to learn

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[129] **Id.** at pp. 208-09. Dr. Rast expressed the opinion that a person who had engaged in repeated acts of criminal violence, both in the free world and while in custody, could reasonably be expected to continue to commit harmful acts to others in the future, even if incarcerated. **Id.**

[130] **Id.** at p. 202. A moment later, Dr. Rast reiterated that the label "sociopath" is employed for persons who are self-centered and who do not learn from experience, and possess a shallow affect. **Id.** at pp. 203-04. However, Dr. Rast also testified that there is no biological aspect to anti-social personality disorder. **Id.** at p. 217.

from his experience because he enjoys manipulating other people.[131] Dr. Rast testified sociopathic personalities appear across all socioeconomic groups and at all intelligence levels.[132]

Moreover, rather than diagnosing petitioner as a sociopath, Dr. Rast's testimony established only that (1) the label sociopath or anti-social personality disorder is not a recognized mental disease but rather a characterization mental health professionals use for persons who engage in a wide variety of anti-social conduct, (2) many of the actions described by the prosecution in a hypothetical question which only vaguely tracked the evidence at petitioner's trial would have fallen within the broad parameters of conduct that is considered sociopathic, and (3) almost by definition, any violent, criminal conduct would be considered sociopathic in nature.[133]

As such, petitioner's suggestions that Dr. Rast testified petitioner suffers from some form of mental defect or disorder which prevents him from learning from his mistakes is simply. On the contrary, Dr. Rast's testimony did not focus on petitioner's mental health or intellectual capacity and did not attempt to identify any mental defect or disease suffered by petitioner. Rather, Dr. Rast's testimony, at best, supported the proposition that much of the criminal activity petitioner was accused of having engaged in constituted sociopathic conduct. Unlike the extensive expert testimony in **Penry**,

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[131] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast, at pp. 203-04, 225-26, and 236-37.

[132] **Id.** at p. 217 .

[133] **Id.** at pp. 202-09, 215, and 236.

there was no evidence introduced at either petitioner's trial or the evidentiary hearing on petitioner's state habeas corpus application showing petitioner has ever suffered from any mental disease or intellectual defect which prevents petitioner from learning from his mistakes. On the contrary, Dr. Rast's testimony regarding the label "sociopathic" that arguably could be applied to petitioner's conduct did not establish anything more than that some people choose not to conform their behavior to societal norms and that mental health professionals refer to these people as "sociopaths."

There was also no evidence introduced at petitioner's trial suggesting petitioner suffered from any intellectual defect, such as mental retardation, any organic brain damage, or any mental illness that prevented petitioner from conforming his behavior to societal norms or learning from his mistakes. Rather, the testimony regarding anti-social personality disorder merely recognized that persons who repeatedly engage in violent criminal activity are, by definition, considered to be anti-social. It is well-settled in this Circuit that evidence a capital murder defendant has been diagnosed as an anti-social personality does not warrant the type of supplemental instruction required by the holding in **Penry**.[134]

The defendant in **Penry** (1) was severely retarded, (2) had suffered brain damage, probably caused at birth but which may have been caused by beatings and multiple injuries to his brain at an early age, (3) was frequently beaten over the head with a belt when he was a child, (4) was routinely locked in his room without access to a toilet for long periods of time, (5) struggled for over a year to learn to print

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[134] See **Demouchette v. Collins**, 972 F.2d at 653-54.

his name, and (6) as a youngster, was in and out of state schools and hospitals until age twelve. None of the evidence petitioner introduced at his 1981 trial was similar to the history of abuse the defendant in **Penry** experienced. Likewise, contrary to petitioner's assertions, there was no evidence introduced at petitioner's trial establishing petitioner suffered from either mental retardation, organic brain damage, a childhood characterized by extreme physical and emotional abuse, or any other condition that rendered petitioner unable to learn from his mistakes, as opposed to merely unwilling to do so.

The second problem with petitioner's **Penry** claims is petitioner's failure to introduce any evidence at his trial establishing that he experienced a deprived or abusive childhood similar to the extreme physical and emotional trauma inflicted on the defendant in **Penry**. On the contrary, petitioner's sister and family pastor both testified petitioner was raised in a religious, stable, middle-class family in which decent, good parents strictly enforced discipline. None of the witnesses at petitioner's trial mentioned any hint of physical or emotional abuse inflicted on petitioner by his father or older siblings of the nature involved in **Penry**. As explained above, a petitioner may not base a **Penry** claim on evidence that could have been but was not proffered at trial.[135]

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[135] See **West v. Johnson**, 92 F.3d at 1405; **Briddle v. Scott**, 63 F.3d at 377; **Allridge v. Scott**, 41 F.3d at 223; **Crank v. Collins**, 19 F.3d at 176; **Anderson v. Collins**, 18 F.3d at 1214-15; **Calling v. Collins**, 998 F.2d at 275; **Barnard v. Collins**, 958 F.2d at 637; **Wilkerson v. Collins**, 950 F.2d at 1061; **May v. Collins**, 904 F.2d at 232; **DeLuna v. Lynaugh**, 890 F.2d at 722. Thus, petitioner is not entitled to rely upon evidence regarding his family

d. Analyzing the Purported **Penry** Evidence

(1) Alleged Inability to Learn

Petitioner's evidence that he arguably qualifies for labeling by mental health professionals as an anti-social personality did not require a **Penry** instruction, as that evidence could have been adequately considered by the jury in connection with the first special sentencing issue regarding deliberateness.[136] Furthermore, petitioner introduced no evidence at his trial establishing there was any causal connection between his antisocial personality disorder, assuming that petitioner actually qualified for that label, and his robbery and murder of John Ebbert.[137] As explained above, petitioner did not introduce any evidence at trial showing he suffers from mental retardation, organic brain damage, or any other mental defect preventing petitioner from conforming his conduct to the law.[138] The label of "antisocial

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background or history of childhood abuse that was developed during his state habeas corpus proceeding for the purpose of urging his **Penry** claims herein.

[136] See **Demouchette v. Collins**, 972 F.2d at 653-54.

[137] See **Madden v. Collins**, 18 F.3d at 307-08 (holding that evidence the defendant suffered from an anti-social personality, dyslexia, and a troubled childhood was not relevant for **Penry** purposes absent a showing that the defendant's criminal conduct was attributable to same).

[138] Petitioner's Pastor, Norb Kabelitz, did mention at one point in his trial testimony that petitioner had difficulty learning to read and that this impacted upon the petitioner's self-image. See S.F. Trial, Volume 6,

personality disorder" petitioner apparently now claims does not have a biological basis, cuts across all intellectual levels, and is not evidence of diminished intellectual functioning.[139]

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testimony of Norb Kabelitz, at p. 245. However, Pastor Kabelitz also testified petitioner was a well-behaved child who got along well with his peers and did not show any signs of being violent during his youth. **Id.** at pp. 250-53 and 257. Moreover, the trial testimony of petitioner's sister established that the petitioner was an average student who got along great with his classmates and managed to reach his senior year in high school before dropping out of school. **Id.** at Volume 6, testimony of Paquita Richardson, at pp. 131-32. Petitioner's sister also testified that there were no scars on the family and that the petitioner grew up in a typical middle class family atmosphere in a home with good and decent parents. **Id.** at p. 137.

[139] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast, at p. 217 and 236. Dr. Rast testified that antisocial personality disorder is not a mental disorder. **Id.** at p. 236. The Court notes that many serial killers, including the infamous Ted Bundy, have been recognized as possessing above-average intelligence. Contrary to the implication underlying petitioner's "inability to learn from his mistakes" theory, proof a defendant has repeatedly engaged in violent, criminal conduct does not, as a matter of law, establish that the defendant suffers from some mental defect. Petitioner offered no evidence at either his trial or his state habeas corpus hearing to suggest otherwise.

(2) Allegedly Troubled Childhood

Petitioner's evidence regarding his purported troubled childhood also did not warrant a **Penry** instruction. Petitioner did not offer any evidence at trial showing he suffered from an abusive childhood. Even if he had, however, it is well-settled in this Circuit that evidence a defendant had a difficult, abusive, or traumatic childhood does not, standing alone, warrant a **Penry** instruction.[140] While a rational jury may infer that evidence of a long-standing, pattern of severe physical or emotional abuse inflicted upon a child of tender years renders that child less morally culpable for a violent crime, isolated episodes of violence or physical abuse inflicted upon a defendant do not, standing alone, constitute relevant mitigating evidence because there is no inherent nexus between such isolated episodes and the capital offense.[141] Thus, absent evidence showing that extreme, severe, or sustained mental or physical abuse was inflicted upon a capital murder defendant during childhood, a defendant asserting a history of child abuse in mitigation at sentencing must come forward with expert testimony or other evidence directly linking his or her capital offense to some form of physical, mental, or emotional abuse the defendant suffered as a child.[142] Petitioner failed to present any such evidence during his 1981 trial.

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[140] See **Lackey v. Scott**, 28 F.3d at 489; **Madden v. Collins**, 18 F.3d at 307-08; **Russell v. Collins**, 998 F.2d at 1292-93; **Drew v. Collins**, 964 F.2d at 420-21; **Lincecum v. Collins**, 958 F.2d at 1282-84; **Barnard v. Collins**, 958 F.2d at 638-39.

[141] See **Russell v. Collins**, 998 F.2d at 1292-93.

[142] **Id.**

(3) Positive Character Traits and Talents

Petitioner's evidence of his religious devotion, voluntary service, kindness to others, artistic and poetic talent, and close family ties likewise could have been considered by petitioner's jury in the course of addressing the second Texas capital sentencing special issue regarding future dangerousness and did not require a special **Penry**-like instruction. It has long been settled in this Circuit that evidence of good character or positive traits and qualities, such as creative or artistic talent, does not require a **Penry** instruction.[143]

e. The "Chilling Effect" Argument

Insofar as petitioner argues the Texas capital sentencing scheme in place at the time of his trial "chilled" the ability of petitioner's trial counsel to develop and introduce evidence showing petitioner experienced a physically and emotionally abusive childhood, the same scheme did not prevent the defense lawyers in **Penry** from developing and introducing far more graphic evidence of abuse at trial in that case. The Fifth Circuit has repeatedly rejected this exact same argument.[144] The fact that a defense

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[143] See **Nichols v. Scott**, 69 F.3d at 1267-68 & 1278; **Crank v. Collins**, 19 F.3d at 175; **James v. Collins**, 987 F.2d at 1121-22; **Jernigan v. Collins**, 980 F.2d at 295; **Holland v. Collins**, 962 F.2d at 419-20; **Black v. Collins**, 962 F.2d at 404-05; **Barnard v. Collins**, 958 F.2d at 638-39; **Graham v. Collins**, 950 F.2d at 1032-33; **Green v. Collins**, 947 F.2d at 1232.

[144] See **West v. Johnson**, 92 F.3d at 1406; **Woods v. Johnson**, 75 F.3d at 1033; **Briddle v. Scott**, 63 F.3d at

counsel's tactical decisions in a sentencing proceeding were shaped or channeled by the requirements of the statutory scheme under which the state proceeds does not interfere with defense counsel's independent strategic decision-making to the point defendant is denied effective assistance of counsel.[145]

Petitioner's trial counsel testified at the state habeas corpus hearing that his tactical decisions were based upon careful consideration of the Texas capital sentencing scheme as it existed in 1981.[146] Attorney Cazier testified he did not

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377-78; **Mann v. Scott**, 41 F.3d 968, 980 (5th Cir. 1994), **cert. denied**, 514 U.S. 1117 (1995) ; **Lackey v. Scott**, 28 F.3d 486, 490 (5th Cir. 1994), **cert. denied**, 513 U.S. 1086 (1995); **Andrews v. Collins**, 21 F.3d 612, 630 (5th Cir. 1994), **cert. denied**, 513 U.S. 1114 (1995), **Crank v. Collins**, 19 F.3d at 176; **Black v. Collins**, 962 F.2d at 407; **May v. Collins**, 948 F.2d 162, 167 (5th Cir. 1991), **cert. denied**, 502 U.S. 1046 (1992).

[145] See **Black v. Collins**, 962 F.2d at 407; **May v. Collins**, 948 F.2d at 167-68.

[146] See State Habeas Hearing, Volume V of VIII, testimony of Allen Cazier, at pp. 514-613. Interestingly, attorney Cazier testified that, contrary to the testimony of the petitioner's brother Julio Richardson, attorney Cazier did meet with Julio, petitioner's parents, and other members of petitioner's family prior to petitioner's 1981 trial and that petitioner's family did not reveal petitioner had any history of physical or sexual abuse. **Id.** at pp. 517-19. In contrast, Julio Richardson testified at that same hearing that he did not meet with any of the petitioner's attorneys prior to petitioner's trial and that he was unaware

pursue the possibility of any history of child abuse on behalf of petitioner because neither petitioner nor petitioner's family made him aware of any such history and because any such evidence would have played into the prosecution's strategy of showing the petitioner was a sociopath.[147] Petitioner's trial counsel's strategic reasoning was sound, given the fact that petitioner was tried many years before the Supreme Court decided **Penry**. Under such circumstances, there was nothing professionally deficient about petitioner's trial counsel's strategic or tactical decision-making at the time of petitioner's 1981 trial.[148]

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petitioner was charged with capital murder until after the petitioner was convicted. See State Habeas Hearing, Volume IV of VIII, at pp. 419-20.

[147] See State Habeas Hearing, Volume V of VIII, testimony of Allen Cazier, at pp. 519-20, 526-27, 530-32, 567-68, 576-77, 580, 597, 599, 601, 603, 605-06, and 610.

[148] See **Crane v. Johnson**, 178 F.3d 309, 313-14 (5th Cir.), **cert. denied**, 120 S. Ct. 369 (1999)(holding that trial counsel's failure to develop and present purportedly mitigating evidence regarding defendant's mental impairment was reasonable strategic decision where trial counsel investigated defendant's mental impairment and concluded that evidence of same would defeat trial strategy of attempting to obtain a favorable jury response to future dangerousness issue and might have opened door to harmful evidence regarding the defendant's rages and violent tendencies); **Rector v. Johnson**, 120 F.3d at 564 (holding that failure to present mitigating evidence is not a per se showing of ineffective assistance if based on well informed, strategic decisions); **Wilkerson v. Collins**, 950

f. **Teague** Foreclosure

Neither the Supreme Court nor the Fifth Circuit have extended the holding in **Penry** to reach any of the purportedly mitigating evidence petitioner actually introduced at his 1981 capital murder trial. Likewise, the Fifth Circuit has repeatedly rejected the "chilling effect" argument petitioner presents here and the Supreme Court has repeatedly denied certiorari when the Fifth Circuit has done so. Under such circumstances, adopting any of the contentions petitioner raises in his second group of claims herein would necessarily require this court to adopt a new rule for purposes of **Teague**.

3. AEDPA Review

As explained above, the Supreme Court's and Fifth Circuit's subsequent opinions have effectively circumscribed the holding in **Penry** to an extremely narrow class of cases involving evidence of a capital murder defendant's mental retardation, organic brain damage, and severe emotional and physical abuse sufficient to render a defendant intellectually incapable of appreciating the wrongfulness of his own criminal conduct or conforming his conduct to the strictures of the law. Petitioner introduced no evidence before the jury at trial which falls near the parameters of a legitimate **Penry** claim.[149] The Court's adoption of petitioner's "chilling effect"

F.2d at 1065(holding the same); **Garland v. Maggio**, 717 F.2d 199, 206 (5th Cir. 1983)("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.")

[149] The petitioner's rambling testimony during the hearing on the issue of whether Victoria Franklin was his common

argument is clearly barred by **Teague**. Under such circumstances, the state court's rejection of petitioner's **Penry** claims and quasi-**Penry** "chilling effect" claim was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's second group of claims do not warrant federal habeas relief under the AEDPA.

4. Conclusions

Regardless of whether this Court conducts a de novo review of petitioner's second group of claims or employs the AEDPA's standard, petitioner is entitled to no relief based on those claims. Furthermore, the claims raised in petitioner's

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law wife suggested petitioner suffers from delusions of credibility. See S.F. Trial, Volume 5, testimony of Miguel Richardson, at pp. 146-64. During his testimony at that hearing outside the jury's presence, the petitioner (1) claimed that he would never lie under oath, (2) admitted that he had twice filed false affidavits in the Colorado courts when he was fighting extradition attesting to the fact that he was unmarried, (3) claimed that he filed those false affidavits because he was interested in "catching" female attorneys who were representing him at the time, but (4) he was legally married to Victoria Franklin throughout this entire time frame. **Id.** at pp. 152-57. However, the jury was not permitted to witness the petitioner's performance, in which he also claimed to be able to turn any woman into a prostitute simply by talking to her. **Id.** at p. 163.

second group of claims seek the expansion of existing legal doctrines beyond their current parameters such that those claims are all foreclosed by the non-retroactivity doctrine of **Teague**. Existing Fifth Circuit and Supreme Court case law regarding **Penry** claims is so well-settled in opposition to petitioner's arguments that petitioner's second group of claims do not warrant a Certificate of Appealability.

C. Quasi-**Witherspoon** Claim

1. The Claim

In his third claim for relief herein, petitioner complains that during the voir dire portion of trial, the state trial court erroneously excluded a prospective juror named William Graves Noble who had allegedly qualified under the Supreme Court's holding in **Witherspoon v. Illinois** and that the Texas Court of Criminal Appeals erred when, in the course of petitioner's direct appeal, that court held the trial court's error in excusing venire member Noble was harmless.[150]

2. De Novo Review

a. A Note on **Witherspoon** and Its Progeny

In **Witherspoon v. Illinois**,[151] the Supreme Court held that prospective jurors may not be excused from sitting on a capital jury simply because they voiced general objections to

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[150] See Amended Petition, at pp. 40-52; and Reply Memorandum, at pp. 11-13.

[151] 391 U.S. 510, 521-23 (1968).

the death penalty or expressed conscientious or religious scruples against its infliction. Rather, the Supreme Court held as follows:

> The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty regardless of the facts and circumstances that might emerge in the course of the proceedings.[152]

In **Wainwright v. Witt**, the Supreme Court clarified its holding in **Witherspoon**, holding the proper inquiry when faced with a venire member who expresses personal, conscientious, or religious views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[153] In **Witt**, the Supreme Court also emphasized that considerable deference is to be given the trial court's firsthand evaluation of the potential juror's demeanor and that no particular magical incantation or word choice need necessarily be followed in interrogating the potential juror in this regard.[154] In **Gray v. Mississippi**, the

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[152] **Witherspoon v. Illinois**, 391 U.S. at 522 n.21.

[153] **Wainwright v. Witt**, 469 U.S. 412, 424 (1985); accord **McFadden v. Johnson**, 166 F.3d 757, 760 (5th Cir.), **cert. denied**, 120 S. Ct. 369 (1999); **Fuller v. Johnson**, 114 F.3d 491, 500 (5th Cir.), **cert. denied**, 522 U.S. 963 (1997).

[154] See **Wainwright v. Witt**, 469 U.S. at 430-35.

Supreme Court held the erroneous dismissal of a potential juror in violation of **Witherspoon** was not subject to harmless error analysis.[155]

b. Setting the Record Straight

Petitioner argues the trial court's exclusion of venire member Noble violated the rule in **Witherspoon** and the Texas Court of Criminal Appeals erred when it held that error to be harmless under applicable Texas law. The trial court's exclusion of Mr. Noble had nothing to do with his personal views on capital punishment. Rather, the trial court excluded Mr. Noble because he forthrightly volunteered that he had been exposed to considerable pretrial publicity about petitioner's case and had already formed an opinion on the issue of guilt or innocence. Thus, the petitioner's reliance on **Witherspoon** is misplaced.

This Court's independent review of the voir dire examination of William Graves Noble reveals the state trial court excused Mr. Noble not because Mr. Noble expressed personal reservations about his ability to vote to impose the death penalty but, rather, because Mr. Noble volunteered he had been exposed to substantial pretrial publicity regarding petitioner's case and had already formed an opinion of the petitioner's guilt or innocence. More specifically, the rather brief voir dire examination of Mr. Noble consisted of a general series of questions, followed by several exchanges in which Mr. Noble indicated he had conscientious scruples against the death penalty and he was "irrevocably committed before trial to automatically voting" against the death penalty

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[155] See **Gray v. Mississippi**, 481 U.S. 648, 668 (1987); **Fuller v. Johnson**, 114 F.3d at 500.

regardless of the facts and circumstances.[156] At that point, the prosecution moved to excuse Mr. Noble for cause. However, the trial court then conducted further questioning during which Mr. Noble indicated that while he would have to wrestle long and hard with his conscience, he believed he could set aside his personal views and follow his oath as a juror to return a verdict based upon the court's instructions and the evidence.[157] The trial court then denied the State's challenge for cause and the prosecution resumed its interrogation, at which point, the following exchange occurred:

> Q. I'm not asking you to not contradict yourself or to contradict yourself, I'm asking you just to tell me just as honestly as you can so that I will know whether or not you can sit here as a fair and unbiased juror and do the job that the jurors must do?
> A. If I were a juror I would try to serve to the best of my ability. That's what I can say.
> Q. All right.
> A. You used a couple of words there, bias and impartial that I think you might want to pursue.
> Q. Well, are you biased in some manner about this case?
> A. Well, I have read quite a bit about it. And I feel that I have already prejudged the case. I mean I take all the newspapers. I'm a

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[156] See S.F. Trial, Volume 2, voir dire examination of William Graves Noble, at pp. 147-52.

[157] **Id.** at pp. 152-54.

journalist by profession and I know - I don't disregard what I see in the paper.
THE COURT: Have you already formed an opinion as to the guilt or innocence?
THE WITNESS: Yes, Your Honor. I think it's only fair to say that I have formed an opinion.
THE COURT: You will be excused Mr. Noble. You can return to the Central Jury Room. They will discharge you from there.
MR. CAZIER: If the Court please, the Defendant objects to Mr. Noble being excused, the entire predicate not having been laid for his excuse.
THE COURT: You are excused.
THE COURT: The statute provides if the juror states from hearsay or otherwise he has already formed an opinion as to the guilt or innocence of the Defendant there will be no further questioning.
MR. CAZIER: Does it say one more sentence?[158]

Petitioner argues the trial court's purportedly erroneous act, excusing a member of petitioner's jury venire based upon the trial court's perception that the venire member had already formed an opinion regarding the petitioner's guilt, somehow implicates the Supreme Court's holding in **Witherspoon**. This Court finds nothing in the record from the voir dire examination of Mr. Noble that would indicate the trial court's exclusion of Mr. Noble had anything to do with the rule or holding in **Witherspoon**. The trial court excluded Mr. Noble because it perceived Mr. Noble's forthright action

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[158] **Id.** at pp. 155-57.

in volunteering he had already prejudged the defendant's guilt or innocence amply demonstrated a bias or prejudice that could not be cured through further questioning.

On direct appeal from his conviction, petitioner complained about the exclusion of Mr. Noble. The Texas Court of Criminal Appeals determined the trial judge had acted prematurely under applicable state law, which at that time required examination of a potential juror who expressed personal prejudice on the issue of guilt or innocence to ascertain whether the juror's prejudice would influence his verdict.[159] However, the Texas Court of Criminal Appeals went on to conclude the trial court's error in excluding Mr. Noble was harmless under applicable state law because the prosecution had not exhausted its peremptory challenges.[160] Insofar as petitioner asks this Court to review the state trial court's compliance with state procedural rules or the Texas Court of Criminal Appeals' application of state harmless error principles, for the reasons set forth in Section II.B. above, those complaints raise only matters of state law and do not furnish a basis for federal habeas corpus relief.

c. **Teague** Foreclosure

Petitioner argues the trial court's exclusion of Mr. Noble violated the holding in **Witherspoon** and could never be harmless.

Petitioner's contention fails because what he urges this Court to do in his third claim for relief is to adopt a new rule of criminal procedure, to wit, that the exclusion of any

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[159] See **Richardson v. State**, 744 S.W.2d at 68.

[160] See **Richardson v. State**, 744 S.W.2d at 69-71.

Witherspoon-qualified juror for any reason is impermissible. There is no established support for such a proposition in the case law of this nation and there was none at the time petitioner's conviction became final. Nothing in the Constitution guarantees that a capital murder defendant is entitled to insist upon a jury made up of citizens who have already prejudged the issue of guilt or innocence. Nothing in the Constitution prohibited the trial court's exclusion of a potential juror who expressed a firm opinion he had already prejudged the question of guilt or innocence. Thus, the principles on which petitioner relies in his third ground for relief are foreclosed by the rule in **Teague**.

d. Federal Harmless Error Analysis

The trial court excluded Mr. Noble because he testified (1) he had been exposed to extensive pretrial publicity about the case, (2) as a professional journalist, he did not disregard what he read in the papers, and (3) he had already formed an opinion as to petitioner's guilt or innocence. Under the circumstances of this case, especially the overwhelming evidence of petitioner's guilt, the deliberateness of petitioner's murder of Ebbert, and petitioner's propensity for future violence, the trial court's exclusion of Mr. Noble most certainly did not have a substantial and injurious effect or influence on the jury's verdict at either stage of petitioner's trial.[161]

e. No Merit

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[161] Because there was no **Witherspoon** issue raised by the trial court's exclusion of Mr. Noble, the holding in **Gray v. Mississippi** is inapposite to this cause.

Setting aside the harmless error and **Teague** barriers to relief under petitioner's third claim herein, this Court concludes the exclusion of Mr. Noble did not violate any recognized federal constitutional right possessed by petitioner.

The Sixth Amendment guarantees a criminal defendant the right to an impartial jury.[162] Generally, where a party seeks to exclude a venire member because of bias, that party must demonstrate through questioning that the potential juror lacks impartiality.[163] Here, however, the trial court sua sponte made a finding of partiality and excused Mr. Noble. Even under pre-AEDPA case law, a trial judge's finding of bias during voir dire was a factual determination entitled to the deference and same presumption of correctness on collateral review owed other state court fact findings under former Section 2254 (d).[164]

Having reviewed the entire voir dire examination of Mr. Noble, this Court finds no reason to second-guess the trial court's implicit finding of bias on the part of Mr. Noble. Significantly, Mr. Noble conscientiously volunteered he was biased and had prejudged the issue of petitioner's guilt or innocence. Mr. Noble, a journalist, also expressed

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[162] See **Morgan v. Illinois**, 504 U.S. 719, 727 (1992); **United States v. Webster**, 162 F.3d 308, 341 (5th Cir. 1998), **cert. denied**, 120 S. Ct. 83 (1999).

[163] **Wainwright v. Witt**, 469 U.S. 412, 424 (1985); **Fuller v. Johnson**, 114 F.3d at 499-500.

[164] See **Wainwright v. Witt**, 469 U.S. at 426-27; **Fuller v. Johnson**, 114 F.3d at 500-01; **Mann v. Scott**, 41 F.3d at 980.

reservations about his ability to disregard what he had read about the case, which certainly warranted concern on the trial court's part about Mr. Noble's ability to render a verdict based solely on the evidence introduced at trial. As the Supreme Court noted in **Witt**:

> the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.[165]

Having reviewed the voir dire of Mr. Noble, this Court can find no basis for questioning the trial court's implicit finding of bias or for concluding that the trial court's exclusion of Mr. Noble violated petitioner's constitutional right to have his case determined by a fair and impartial jury. Petitioner has not identified any juror who actually served on his petit jury whom petitioner argues was biased or not impartial. Therefore, petitioner's third claim presents no basis for federal habeas corpus relief.

3. AEDPA Review

Petitioner's third claim for relief urges the adoption of a new rule of federal criminal procedure. Furthermore, any error in connection with the exclusion of Mr. Noble based upon his confession of having prejudged the issue of guilt or innocence was harmless. Under these circumstances, the state court's rejection of petitioner's third claim for relief was

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[165] **Wainwright v. Witt**, 469 U.S. at 423.

neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's third claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner's third claim for relief is premised on an assumption the trial court excluded Mr. Noble because of his views on the death penalty. From that initial assumption, petitioner argues against the Texas Court of Criminal Appeals' application of state procedural and harmless error principles, neither of which rise to the level of federal constitutional issues in this context. Petitioner's constitutional right to an impartial jury was not violated by the trial court's exclusion of Mr. Noble. Petitioner's suggestion that this Court adopt a new rule barring exclusion of any **Witherspoon**-qualified juror is foreclosed by the rule in **Teague**. Any error with regard to the exclusion of Mr Noble was harmless under the appropriate federal constitutional standard. Under such circumstances, petitioner's third claim warrants neither federal habeas corpus relief nor a Certificate of Appealability.

D. Lethal Injection in Texas and the Eighth Amendment

1. The Claim

In his fourth ground for relief, petitioner argues the method of lethal injection employed by the State of Texas violates the Eighth Amendment.[166]

2. De Novo Review

a. The Lack of Evidence Supporting this Claim

Petitioner offered the state courts no evidence regarding the actual means by which lethal injection is administered in Texas. Likewise, petitioner asks this Court for an evidentiary hearing to develop that issue without alleging any specific facts showing the method actually employed by the State of Texas is in any way defective. Petitioner spent considerable time and energy during the evidentiary hearing held in petitioner's state habeas corpus proceeding challenging the lack of written guidelines and written procedures for carrying out lethal injections in Texas. However, petitioner offered no evidence as to precisely how lethal injections are actually carried out in this State.

This Court carefully reviewed all of the testimony on this subject from petitioner's state habeas corpus hearing.

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[166] See Amended Petition at pp. 52-69; Reply Memorandum at p. 14.

(1) Testimony of Dr. Brunner

Dr. Edward Albert Brunner, a physician and professor of anesthesiology, testified extensively at petitioner's state habeas corpus hearing that the limited written materials available to him regarding the precise manner employed by Texas prison officials to carry out execution by lethal injection were insufficiently detailed to assure that either (1) the prisoner would be properly catheterized, (2) the proper doses of medications would be employed in the appropriate sequence and with appropriate intervals in between their administration to fully anesthetize the prisoner before the injection of the two medications which paralyzed the heart and lungs, or (3) the persons actually installing the intravenous catheter and administering the lethal medications were qualified and adequately trained to do so.[167] However, Dr. Brunner admitted he had never witnessed an execution by lethal injection in Texas, or elsewhere, and he had no personal knowledge regarding either the qualifications of the persons who carry out lethal injections in Texas, the procedures actually employed to carry out lethal injections in Texas, or the steps taken in Texas to insure a prisoner is properly catheterized and anesthetized before the flow of life terminating medications begins.[168]

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[167] See Statement of Facts or verbatim transcription of the testimony from the evidentiary hearing in petitioner's state habeas corpus proceeding (henceforth "State Habeas-Hearing"), Volume III of VIII, testimony of Dr. Edward Albert Brunner, at pp. 27-156.

[168] See State Habeas Hearing, Volume III of VIII, testimony of Dr. Edward Albert Brunner, at pp. 115-48.

Dr. Brunner testified that unless great care was taken to insure (1) the prisoner is properly catheterized, i.e., the intravenous needle is properly installed in a vein in such a manner as to allow the unimpeded flow of medications into the circulatory system, (2) an adequate interval has passed since the prisoner's last meal, (3) a proper dose of sodium thiopental or sodium pentothal is employed to adequately anesthetize the prisoner, (4) the catheter remains clear and open, and (5) the patient is actually unconscious before the pancuronium bromide and potassium chloride are injected, the prisoner would experience excruciating pain, tissue necrosis, and aspiration of stomach contents with attendant asphyxiation.[169] Dr. Brunner also discussed at great length (1) the difficulty in properly installing an intravenous catheter and the considerable training and skill required to do so efficiently, (2) the difficulty in properly catheterizing a patient who has been an intravenous drug abuser, and (3) the high degree of variability in determining the dose of sodium pentothal necessary to anesthetize a patient.[170]

However, Dr. Brunner also admitted (1) it was quite possible the potential problems he identified are being avoided in Texas during lethal injections, (2) he did not know the actual sequence of the three drugs employed in Texas to carry out lethal injections, (3) the drugs used in Texas to carry out lethal injections are appropriate for that purpose from a pharmacological standpoint, (4) it is possible to introduce through a proper intravenous catheter a dose of sodium pentothal of sufficient volume and strength to anesthetize

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[169] **Id.** at pp. 43-51, 57, 74-76, 87-88, 94-95, 145, 150-51, and 154.

[170] **Id.** at pp. 35-37, 40, 44-53, 55, and 92.

anyone, (5) it is not necessary that a physician install an intravenous catheter, (6) a person properly anesthetized with sodium pentothal would not feel any pain when the other drugs were injected, provided the person were properly monitored through either an EEG or a check of eye reflexes to insure that full anesthesia had been obtained, and (7) from his personal examination of the petitioner's arms in open court, it did not appear petitioner has suffered any vein scarring in his arms typical of intravenous drug abusers that might impede a lethal injection in petitioner's case.[171]

(2) Testimony of Dr. Denno

Dr. Deborah W. Denno, a Ph.D. criminologist and law professor, testified that she had undertaken a study of what she termed "botched" executions throughout the United States, which she defined as executions that involved technical mishaps that are unforeseeable or unpredictable and can lead to prolonged pain and suffering.[172] Dr. Denno explained she had never witnessed an execution and that her research consisted of studying newspaper accounts of executions and interviewing eyewitnesses.[173] Based upon her research, Dr. Denno testified she had identified eleven "botched" executions in Texas since the Supreme Court's opinion in **Jurek** and proceeded to discuss each of those in detail and to identify why she believed each such execution

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[171] **Id.** at pp. 122, 131-33, 135-37, 141, 143, and 145-46.

[172] See State Habeas Hearing, Volume IV of VIII, testimony of Dr. Deborah W. Denno, at pp. 263-397. Dr. Denno's explanation of what she considered to be "botched" executions appears at pp. 279-80 and 365-66.

[173] **Id.** at pp. 284, 338, 341, 364, and 391-93.

fell within the scope of her definition of "botched."[174] Dr. Denno concluded that, because of the lack of a proper written protocol, the method of lethal injection employed in Texas poses a substantial and unnecessary risk of extreme pain and prolonged suffering.[175]

On cross-examination however, Dr. Denno admitted she had made no effort to obtain autopsy records on any of these eleven individuals or to otherwise ascertain whether any of those persons' bodies showed any post-mortem indications of having aspirated stomach contents, tissue necrosis, or any of the other possible problems Dr. Brunner had identified in his testimony the previous day.[176] Dr. Denno also admitted her definition of the term "botched" was so broad as to include any execution in which, because of the prisoner's physical condition, including a history of intravenous drug use, personnel employed by the State had difficulty locating and properly installing an intravenous catheter.[177] In fact, this Court's independent review of Dr. Denno's testimony reveals that seven of the eleven Texas executions identified by Dr. Denno were characterized by her as such because of the difficulty State personnel experienced in finding a suitable vein in which to place an intravenous catheter.[178] In only

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[174] **Id.** at pp. 306-27.

[175] **Id.** at pp. 293, 301, and 393-94.

[176] **Id.** at pp. 386, 388, and 391-93.

[177] **Id.** at pp. 365-66 and 379.

[178] **Id.** at pp. 304-27. Dr. Denno identified the following persons as victims of what she termed "botched" Texas executions: Charlie Brooks, Jr., James David Autry, Thomas Andy Barefoot, Stephen Peter Morin, Randy L.

three instances, covering a period in which the State of Texas conducted more than one hundred executions, did Dr. Denno testify she had found any reports of any violent physical reactions by the person being executed via lethal injection in

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Woolls, Elliot Rod Johnson, Raymond Landry, Stephen McCoy, Billy White, Justin May, and Ronald Allridge. Of these, Dr. Denno testified that she identified the executions of Brooks, Morin, Woolls, Johnson, Landry, White, and Allridge as "botched" simply because of the delay State employees experienced in either finding or properly installing an intravenous catheter. **Id.** However, she admitted that all of these persons had histories of intravenous drug abuse. **Id.** at pp. 304-27, 376, and 379. Dr. Denno also mentioned that during the execution of Landry, whom she said was so muscular that he was nicknamed "Popeye," Landry's vein "blew out" and State personnel had to re-install the intravenous catheter. **Id.** at pp. 315-17. Dr. Denno listed an eighth execution, i.e., that of Autry, as "botched" because a clogged tube leading to Autry's arm resulted in the execution taking ten minutes. **Id.** at pp. 306-07. Dr. Denno also identified time factors from the instant the drugs began flowing in several other executions as indications to her of mechanical problems; more specifically, those of Brooks - seven minutes, Autry - ten minutes, White - nine minutes, May - nine minutes, and Allridge - nine minutes. This Court notes that Dr. Brunner testified that in his opinion, it would require from four to five minutes for an adequate quantity of sodium pentothal to flow into a person's vein before that person would be fully anesthetized. See State Habeas Hearing. Volume III of VII, testimony of Dr. Edward Albert Brunner at pp. 150-51.

Texas.[179] In none of those instances did she testify that any objectively verifiable evidence existed showing those persons had suffered pain as a result of any mechanical failure or negligence with regard to either the installation of the intravenous catheter or the dose of medication employed during the execution.[180]

Aside from her review of newspaper accounts of Texas executions, Dr. Denno admitted (1) she had no personal knowledge regarding how lethal injections are administered in Texas and (2) she did not purport to possess any expertise regarding how the State of Texas should go about drafting a protocol of the type she and Dr. Brunner said the State of Texas had not yet published in written form.[181]

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[179] Those were the executions of Barefoot, McCoy, and May.

[180] Dr. Denno explained that one or more of the unnamed witnesses to McCoy's execution upon whom she relied had attributed McCoy's apparently violent reaction to the drugs as a result of weak dosage. See State Habeas Hearing, Volume IV of VIII, testimony of Dr. Deborah W. Denno at p. 319. However, Dr. Denno offered no other evidentiary basis to support that speculative conclusion.

[181] See **Id.** at pp. 396-97:

I would say, first of all, and I'm not an expert on how an individual should be executed, and that the State of Texas should get experts who know something. Because from what I can tell, they haven't done that. There is nothing to suggest that they have gone to medical experts to have them devise their protocol. And I would suggest that they start going to somebody who is an expert and not somebody like myself.

b. No Merit

After conducting a review of the testimony of Dr. Brunner and Dr. Denno, it is clear to that neither of these persons, nor any of the other witnesses petitioner presented during the extensive evidentiary hearing held in petitioner's state habeas corpus proceeding, possessed any personal knowledge regarding how lethal injections are administered in Texas. Furthermore, it is also clear that, aside from their expressions of personal opposition to the death penalty in general, the principal complaint these two experts voiced was not with the method of lethal injection actually employed in Texas. Rather, Dr. Brunner and Dr. Denno focused on the lack of detailed, written procedures or guidelines (or a "protocol") for carrying out the intricate steps of ensuring proper installation of an intravenous catheter, proper anesthetization, and proper flow of the drugs employed to execute those convicted of capital murder and sentenced to death in Texas. Aside from the lack of written procedures, neither of these witnesses identified any defect in the method of lethal injection employed in Texas. Both admitted they knew nothing about how such executions are carried out in Texas. On the substance of their testimony, petitioner presents his "as applied" constitutional challenge.

Petitioner identifies no authority to support his premise that the Constitution mandates a method of execution be either completely painless or instantaneous. Likewise, nothing in the Eighth Amendment requires that execution via lethal injection be conducted in a manner that is completely free from even the possibility of negligently inflicted pain.

The Fifth Circuit has specifically approved the use of lethal injection as a means of executing persons convicted of

capital murder and sentenced to death.[182] Because petitioner failed to introduce any evidence showing how lethal injections are actually carried out in Texas, his speculation that human error in connection with the installation of intravenous catheters will lead to prolonging or adding to the pain associated with death by lethal injection does not furnish a basis for federal habeas corpus relief. Moreover, petitioner's failure to allege any specific facts showing any of the possible types of errors about which Dr. Brunner testified actually occurred in Texas lethal injections or are likely to occur during petitioner's execution undermines petitioner's fourth claim for relief herein. There is nothing uncertain about the manner in which petitioner will be executed because human beings must necessarily carry out that procedure. Nor does petitioner offer any evidentiary basis for concluding that the method of lethal injection employed in Texas poses an unreasonable risk of prolonged pain.[183] In fact, at the

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[182] See **Kelly v. Lynaugh**, 862 F.2d 1126, 1135 (5th Cir. 1988), **cert. denied**, 492 U.S. 925 (1989); **Woolls v. McCotter**, 798 F.2d 695, 697-98 (5th Cir.), **cert. denied**, 478 U.S. 1031 (1986).

[183] Contrary to the implications contained in petitioner's briefing in this cause, Dr. Denno was able to identify only four instances of possible human error by Texas officials, resulting in observable, physical reaction by the person being executed. Petitioner's complaints about delays resulting from difficulty in finding suitable veins in long-term intravenous drug users does not begin to show negligence on the part of state officials. Dr. Brunner testified at length about the inherent difficulty in properly installing an intravenous catheter in such persons. The simple fact is the petitioner managed to identify only three or four instances of possible human error occurring in the

extensive evidentiary hearing held in petitioner's state habeas corpus proceeding, petitioner failed to introduce any testimony regarding precisely how lethal injections are carried out in Texas.[184]

Petitioner asks this Court to adopt a new rule prohibiting lethal injection in Texas unless and until detailed, written guidelines or a "protocol" for lethal injection is adopted and published by the State. However, the constitutional prohibition against cruel and unusual punishment has never been construed as a requirement that such guidelines exist. Petitioner premises his fourth claim for relief on an assertion that "as currently administered," the method of lethal injection employed by the State of Texas violates the Eighth Amendment. However, petitioner presented no evidence of same to the state courts and has

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course of Texas' execution of more than one hundred prisoners. Far from establishing any deliberate indifference to the welfare of condemned Texas prisoners, this small percentage of possible errors indicates that Texas has undertaken an extremely successful effort to avoid the types of horrors Dr. Brunner described as inherent in execution by lethal injection execution.

[184] As explained above, both of petitioner's expert witnesses confessed unfamiliarity with regard to the actual manner in which the State of Texas conducts lethal injections. While petitioner's counsel made numerous representations early on during that hearing that the warden of the Walls Unit and other persons possessing personal knowledge of such matters would be called to testify, petitioner failed to call or present any such witnesses during that hearing.

presented this Court with no fact-specific allegations establishing same in this cause. Speculation based on anecdotal hearsay are no substitutes for hard evidence.[185] Petitioner has not alleged any specific facts showing there is any inherent defect in the manner in which lethal injections are currently administered in Texas.

Nothing in the Constitution requires the State of Texas to execute a prisoner only in a manner that is completely painless or instantaneous or in a manner that is consistent with a written protocol. From a practical standpoint, the written protocol petitioner seeks would not protect him or any other Texas death row inmate from the type of human error inherent in the process of installing an intravenous catheter about which Dr. Brunner focused most of his testimony. Petitioner has failed to establish the failure of state officials to

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[185] Petitioner offered the state courts no evidence regarding the actual qualifications of the persons who install intravenous catheters in persons immediately before executions at the Walls Unit. Petitioner offered the state courts no evidence regarding the procedures actually followed by such persons in the course of installing those catheters. Likewise, petitioner offered the state courts no evidence regarding the sequence of the administration of the three drugs employed in Texas lethal injections, the manner of calculating dosages, or the steps, if any, undertaken to ensure proper anesthesia of the prisoner with sodium pentothal before either the pancuronium bromide or potassium chloride begin to flow into the prisoner's vein. In fact, the petitioner offered the state courts no testimony or other, non-hearsay evidence showing what, if anything, is done by State employees before, during, or after a Texas lethal injection.

adopt a protocol of the type he now demands rises to the level of deliberate indifference to the safety of condemned Texas capital murderers.

c. **Teague** Foreclosure

Petitioner cites no Supreme Court or other case law holding a prisoner facing a capital sentence possesses a federal constitutional right to have his execution carried out pursuant to detailed, written, step-by-step guidelines or procedures. This Court's independent research disclosed no support for such a proposition. For that reason, petitioner's fourth claim is also barred by the non-retroactivity doctrine in **Teague**.

3. AEDPA Review

Petitioner's fourth claim for relief seeks the adoption of a new principle which is foreclosed by the doctrine announced in **Teague**. Under such circumstances, the state court's rejection of petitioner's fourth claim for relief was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's fourth claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner's fourth claim for relief is without evidentiary foundation. Petitioner's constitutional right to remain free from the infliction of cruel and unusual punishment is not a guarantee he will be executed in a manner that is either instantaneous or painless. The petitioner's

suggestion this Court adopt a new rule requiring such is foreclosed by the rule in **Teague**. Under such circumstances, petitioner's fourth claim warrants neither federal habeas corpus relief nor a Certificate of Appealability.[186]

E. Dr. Rast's Testimony and Ineffective Assistance

1. The Claims

In his fifth claim for relief, petitioner argues the trial court's admission of the "surprise" testimony of a psychologist, Dr. Robert Rast, violated petitioner's due process rights and his Sixth Amendment right to effective assistance of counsel by depriving petitioner's trial counsel of an opportunity to adequately cross-examine that witness.[187]

2. De Novo Review

a. No Merit

(1) The Facts

On September 16, 1981, on the first day of the punishment phase of petitioner's trial, the prosecution announced it had previously notified the defense it intended to call two mental health experts to testify, namely a Dr. Grigson and a Dr. Schroeder, but would, in fact, only call

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[186] See **Woolls v. McCotter**, 798 F.2d at 698 (holding that complaints about lethal injection via sodium pentothal did not warrant a Certificate of Probable Cause, i.e., the statutory predecessor to a CoA).

[187] See Amended Petition at pp. 69-73; Reply Memorandum at pp. 15-16.

Dr. Grigson.[188] The defense indicated they had expected Dr. Grigson to testify and had previously obtained issuance of a subpoena for Dr. Grigson's income tax returns.[189] However, later, the prosecution informed the trial court and defense counsel that a Dr. Rast would be testifying in lieu of Dr. Grigson. When the prosecution called Dr. Rast to testify at the punishment phase of trial, defense counsel objected and alleged surprise explaining he was prepared to cross-examine Dr. Grigson and Dr. Schroeder, but knew nothing about Dr. Rast.[190] After a hearing outside the jury's presence, the trial court overruled defense counsel's objections and held that Dr. Rast, who had never examined petitioner or petitioner's mental health records, could testify as an expert witness.[191] Significantly, the trial court invited defense counsel to either move for a continuance or identify any area of potential cross-examination which required additional research but defense counsel chose not to pursue either of those two options.[192]

Thereafter, Dr. Rast testified in the manner outlined in Section III.B.2.c above.[193] Petitioner's trial counsel cross-examined Dr. Rast extensively and obtained admissions from

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[188] See S.F. Trial, Volume 6 at pp. 10-13.

[189] **Id.**

[190] **Id.** at pp. 184-99.

[191] **Id.**

[192] **Id.**

[193] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast at pp. 199-237.

this witness that antisocial personality disorder ("ASPD") is not a mental illness, the more flagrant aspects of ASPD tend to diminish over time as the patient ages, the petitioner is not mentally ill, studies by mental health experts had repeatedly found great difficulty by professionals in predicting future violence among incarcerated persons, and there are no reliable criteria for psychiatric predictions of long term future criminal behavior.[194]

(2) Due Process Claim .

Insofar as petitioner's fifth claim herein is premised on due process principles, his contentions fail to warrant federal habeas corpus relief.

It is well-settled law in this Circuit that in reviewing state evidentiary rulings in habeas corpus petitions, a federal court does not sit as a super state supreme court to review error under state law.[195] A federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling also violates a specific federal constitutional right or renders the petitioner's trial fundamentally unfair.[196]

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[194] **Id.** at pp. 215, 217, 221-22, 225-27, 20-31, 234, and 236.

[195] **Bridge v. Lynaugh**, 838 F.2d 770, 772 (5th Cir. 1988).

[196] **Johnson v. Puckett**, 176 F.3d 809, 820 (5th Cir. 1999); **Little v. Johnson**, 162 F.3d 855, 860 (5th Cir. 1998); **Green v. Johnson**, 160 F.3d at 1047; **Lucas v. Johnson**, 132 F.3d at 1079; **Gochicoa v. Johnson**, 118 F.3d 440, 446 (5th Cir. 1997), **cert. denied**, 522 U.S. 440 (1998); **Cupit v. Whitley**, 28 F.3d 532, 536 (5th Cir. 1994), **cert. denied**, 513 U.S. 1163 (1995); **Andrade v. McCotter**, 805 F.2d 1190, 1193 (5th Cir. 1986).

"A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render the petitioner's trial fundamentally unfair."[197] When a federal court reviews state court evidentiary rulings on a petition for habeas corpus, it will grant relief only if the state court error is sufficiently egregious as to render the entire trial fundamentally unfair.[198] The challenged evidence must be a crucial, critical, or highly significant factor in the context of the entire case.[199] The test to determine whether a trial error makes a trial fundamentally unfair is whether there is a

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[197] **Johnson v. Puckett**, 176 F.3d at 820; **Pemberton v. Collins**, 991 F.2d at 1226.

[198] **Castillo v. Johnson**, 141 F.3d 218, 224 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 28 (1998); **Neal v. Cain**, 141 F.3d 207, 214 (5th Cir. 1998); **Pemberton v. Collins**, 991 F.2d at 1226; **Jernigan v. Collins**, 980 F.2d 292, 298 (5th Cir. 1992), **cert. denied**, 508 U.S. 978 (1993); **Edwards v. Lynaugh**, 882 F.2d 160, 164 (5th Cir. 1989); **Bridge v. Lynaugh**, 838 F.2d at 772; **Mullen v. Blackburn**, 808 F.2d 1143, 1145 (5th Cir. 1987); **Dillard v. Blackburn**, 780 F.2d 509, 513 (5th Cir. 1986).

[199] **Johnson v. Puckett**, 176 F.3d at 821; **Little v. Johnson**, 162 F.3d at 862; **Green v. Johnson**, 160 F.3d at 1047; **Neal v. Cain**, 141 F.3d at 214; **Lucas v. Johnson**, 132 F.3d at 1079; **Jernigan v. Collins**, 980 F.2d at 298; **Bridge v. Lynaugh**, 838 F.2d at 772; **Thomas v. Lynaugh**, 812 F.2d 225, 230 (5th Cir.), **cert. denied**, 484 U.S. 842 (1987); **Mullen v. Blackburn**, 808 F.2d at 1145.

reasonable probability the verdict might have been different had the trial been properly conducted.[200]

The trial court's admission of the testimony of Dr. Rast did not render petitioner's trial fundamentally unfair. On the contrary, while being questioned by the prosecution, the only specific testimony Dr. Rast offered regarding petitioner consisted of admissions he had never examined petitioner or knew petitioner personally but that in his opinion, any person who had engaged in all the violent, criminal conduct the prosecutor enumerated in a long-winded hypothetical would, in all probability, continue to commit harmful acts to others, regardless of whether incarcerated or free.[201] Significantly, Dr. Rast offered no testimony based upon any examination of petitioner or of petitioner's mental health records or background.[202]

Thus, insofar as petitioner purports to premise his due process claim on the Supreme Court's opinions in cases such as **Estelle v. Smith**,[203] that effort is in vain. Unlike that

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[200] See **Guidroz v. Lynaugh**, 852 F.2d 832, 835 (5th Cir. 1988); **Rogers v. Lynaugh**, 848 F.2d 606, 609 (5th Cir. 1988).

[201] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast at pp. 207-08. Dr. Rast relied on the elements of the prosecution's hypothetical which established that the hypothetical person in question had engaged in repeated, violent escape attempts while in custody as the basis for his opinion that this hypothetical person would probably continue to behave violently toward others. **Id.**

[202] **Id.** at pp. 209-10.

[203] 451 U.S. 454 (1981).

opinion and the many others which address claims that mental health experts failed to properly advise a criminal defendant of the possible consequences of their cooperating during a psychiatric or psychological interview, there is no dispute that Dr. Rast did not examine petitioner or attempt to testify to any specific facts regarding petitioner personally [204] **Estelle v. Smith** and its progeny are inapposite to petitioner's case.[205]

Likewise, there appears to be no genuine dispute that petitioner and his counsel were well aware that the prosecution intended to present expert mental health testimony on the issue of future dangerousness. Petitioner's trial counsel cross-examined Dr. Rast extensively at trial and elicited a great deal of information regarding the difficulty

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[204] Petitioner's reliance on Fifth Circuit opinions such as **Gholson v. Estelle**, 675 F.2d 734 (5th Cir. 1982), and **Vanderbilt v. Collins**, 994 F.2d 189 (5th Cir. 1993), is unavailing. Those cases addressed situations in which capital murder defendants were denied **Miranda** warnings during interviews by mental health experts who later testified against the defendants at the punishment phase of trial. It is undisputed that Dr. Rast never examined the petitioner and did not rely on any information gleamed in any interview similar to those in either **Gholson** or **Vanderbilt**.

[205] Petitioner's reliance on **Gardner v. Florida**, 430 U.S. 349 (1977), is not persuasive. In **Gardner**, the Supreme Court struck down a death sentence imposed after a state trial judge relied upon information contained in a confidential pre-sentence investigative report, which was never disclosed to defense counsel, to overrule a jury's recommendation of a life sentence.

mental health professionals experience attempting to predict future criminal conduct by convicted felons. Petitioner has identified no additional issues his trial counsel could have explored in further cross-examination had greater advance notice of Dr. Rast's identity been furnished prior to his taking the stand at petitioner's 1981 trial.

In truth, petitioner's trial counsel was quite well prepared when he cross-examined Dr. Rast. Petitioner's lay jury was perfectly capable of reaching the conclusion of future dangerousness on its own, especially when the evidence was undisputed the petitioner had twice attempted to murder jail guards during escape attempts and had repeatedly threatened to return and "get" other jail guards if he were ever to obtain his freedom. Judged in proper context, Dr. Rast's opinion regarding the petitioner's future dangerousness was superfluous.

(3) Sixth Amendment Claims

(a) **Estelle v. Smith** Variant

Insofar as petitioner relies upon the Sixth Amendment aspect of **Estelle v. Smith** and its progeny, that attempt fails because, as explained above, Dr. Rast never interviewed petitioner and did not purport to base his opinion on any information obtained through an uncounseled interview of petitioner. Thus, the Sixth Amendment component of **Estelle** and its progeny does not apply to the petitioner's case.

(b) True Ineffective Assistance

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was

announced by the Supreme Court in the case of **Strickland v. Washington**:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[206]

In order to establish his counsel's performance was constitutionally deficient, a convicted defendant must show counsel's representation "fell below an objective standard of reasonableness."[207] In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption the conduct of his trial counsel falls within a wide range of

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[206] 466 U.S. 668, 687 (1984).

[207] **Darden v. Wainwright**, 477 U.S. 168, 184 (1986); **Strickland v. Washington**, 466 U.S. at 687-88; **Lackey v. Johnson**, 116 F.3d 149, 152 (5th Cir. 1997); **Andrews v. Collins**, 21 F.3d 612, 621 (5th Cir. 1994), **cert. denied**, 513 U.S. 1114 (1995); **Duff-Smith v. Collins**, 973 F.2d 1175, 1182 (5th Cir. 1992), **cert. denied**, 507 U.S. 1056 (1993); **Black v. Collins**, 962 F.2d 394, 401 (5th Cir.), **cert. denied**, 504 U.S. 992 (1992).

reasonable professional assistance.[208] The courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight.[209] It is strongly presumed that counsel

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[208] See **Strickland v. Washington**, 466 U.S. at 687-91; **Green v. Johnson**, 160 F.3d at 1035 n.l; **Carter v. Johnson**, 131 F.3d at 463; **Belyeu v. Scott**, 67 F.3d 535, 538 (5th Cir. 1995), **cert. denied**, 517 U.S. 1144 (1996); **Duff-Smith v. Collins**, 973 F.2d at 1182. A federal habeas petitioner must carry the burden of demonstrating both counsel's deficient performance and resultant prejudice. **Burnett v. Collins**, 982 F.2d 922, 928 (5th Cir. 1993); **Martin v. Maggio**, 711 F.2d 1273, 1279 (5th Cir. 1983), **cert. denied**, 469 U.S. 1028 (1984).

[209] See **Lockhart v. Fretwell**, 506 U.S. 364, 372 (1993); **Burger v. Kemp**, 483 U.S. 776, 789 (1987); **Strickland v. Washington**, 466 U.S. at 689; **Carter v. Johnson**, 131 F.3d at 463; **Williams v. Cain**, 125 F.3d at 276 (holding that review of the first prong of **Strickland** requires consideration of the facts and resources available to defense counsel at the time of trial); **Green v. Johnson**, 116 F.3d 1115, 1122 (5th Cir. 1997); **United States v. Gaudet**, 81 F.3d 585, 592 (5th Cir. 1996); **Belyeu v. Scott**, 67 F.3d at 538. The deficiency prong of **Strickland** is judged by counsel's conduct under the law existing at the time of the conduct, see **Westley v. Johnson**, 83 F.3d 714, 723 (5th Cir. 1996), **cert. denied**, 519 U.S. 1094 (1997)(citing **Lockhart v. Fretwell**, 506 U.S. at 372), and in view of the facts and resources available at the time of trial, see **Williams v. Cain**, 125 F.3d at 276 (citing **Motley v. Collins**, 18 F.3d 1223, 1226 (5th Cir.), **cert. denied**, 513 U.S. 960 (1994)).

has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.[210] An attorney's strategic choices, usually based on information supplied by the defendant and from a thorough investigation of relevant facts and law are virtually unchallengeable.[211] Counsel is required neither to advance

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[210] See **Strickland v. Washington**, 466 U.S. at 690; **Duff-Smith v. Collins**, 973 F.2d at 1182.

[211] See **Jones v. Jones**, 163 F.3d 285, 300 (5th Cir. 1998), **cert. denied**, 120 S. Ct. 224 (1999); **Ransom v. Johnson**, 126 F.3d 716, 721 (5th Cir.), **cert. denied**, 522 U.S. 944 (1997); **Green v. Johnson**, 116 F.3d at 1122("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness."); **Boyle v. Johnson**, 93 F.3d 180, 187-88 (5th Cir. 1996), **cert. denied**, 519 U.S. 1120 (1997) (holding that an attorney's decision not to pursue a mental health defense or to present mitigating evidence concerning the defendant's possible mental illness was reasonable where counsel was concerned that such testimony would not be viewed as mitigating by the jury and that the prosecution might respond to such testimony by putting on its own psychiatric testimony regarding the defendant's violent tendencies); **West v. Johnson**, 92 F.3d 1385, 1406-09 (5th Cir. 1996), **cert. denied**, 520 U.S. 1242 (1997)(holding that a trial counsel's failure to conduct further investigation into the defendant's head injury and psychological problems was reasonable where interviews with the defendant and the defendant's family failed to produce any helpful information); **Bryant v. Scott**, 28 F.3d 1411, 1435 (5th Cir. 1994)(citing **Strickland v.**

every non-frivolous argument nor to investigate every conceivable matter inquiry into which could be classified as non-frivolous.[212] A criminal defense counsel is not required to

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Washington, 466 U.S. at 691); **Andrews v. Collins**, 21 F.3d at 623 (holding that counsel acted reasonably in failing to further pursue the defendant's mental capacity or background where counsel had no reason to believe that further investigation would be useful).

[212] See **Neal v. Cain**, 141 F.3d 207, 214-15 (5th Cir. 1998) (holding that petitioner's complaints regarding counsel's failure to raise specific defenses did not satisfy prejudice prong of **Strickland** where proposed defenses were without merit); **Sones v. Hargett**, 61 F.3d 410, 415 n.5 (5th Cir. 1995) ("Counsel cannot be deficient for failing to press a frivolous point."); **United States v. Gibson**, 55 F.3d 173, 179 (5th Cir. 1995)("Counsel is not required by the Sixth Amendment to file meritless motions."); **Smith v. Collins**, 977 F.2d 951, 960 (5th Cir. 1992), **cert. denied**, 510 U.S. 829 (1993) ("The defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources."); **Koch v. Puckett**, 907 F.2d 524, 527 (5th Cir. 1990) ("counsel is not required to make futile motions or objections"); **Schwander v. Blackburn**, 750 F.2d 494, 500 (5th Cir. 1985) (holding that defense counsel is not required to investigate everyone whose name is mentioned by the defendant); **Murray v. Maggio**, 736 F.2d 279, 283 (5th Cir. 1984) ("Counsel is not required to engage in the filing of futile motions.")

exercise clairvoyance during the course of a criminal trial.[213] Likewise, the Sixth Amendment does not require that counsel do what is impossible or unethical; if there is no bona fide defense to the charge, counsel is not required to create one.[214]

The proper standard for evaluating counsel's performance under the Sixth Amendment is "reasonably effective assistance."[215] "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[216] Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[217] In order to establish he has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional

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[213] See **Sharp v. Johnson**, 107 F.3d 282, 290 n.28 (5th Cir. 1997)(citing **Garland v. Maggio**, 717 F. 2d 199, 207 (5th Cir. 1983)) (holding that clairvoyance is not a required attribute of effective representation); see also **Lackey v. Johnson**, 116 F.3d at 152 (holding that trial counsel was not ineffective for failing to discover evidence about which the defendant knew but withheld from his counsel).

[214] See **United States v. Cronic**, 466 U.S. 648, 656 n.19 (1984); **Jones v. Jones**, 163 F.3d 285, 303 (5th Cir, 1998).

[215] **Strickland v. Washington**, 466 U.S. at 687; **Bullock v. Whitley** 53 F.3d 697, 700 (5th Cir. 1995).

[216] **Strickland v. Washington**, 466 U.S. at 691.

[217] **Strickland v. Washington**, 466 U.S. at 692.

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[218] In addition, analysis of the second or "prejudice" prong of the **Strickland** test must include examination of whether counsel's deficient performance caused the outcome to be unreliable or the proceeding to be fundamentally unfair.[219] "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[220]

In summary, in order to prevail on a claim of ineffective assistance of counsel, a convicted defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the

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[218] 466 U.S. at 694.

[219] See **Lockhart v. Fretwell**, 506 U.S. 364, 368-73 (1993); **Mayabb v. Johnson**, 168 F.3d 863, 869 (5th Cir.), **cert. denied**, 120 S. Ct. 409 (1999); **Green v. Johnson**, 160 F.3d at 1035-36; **Goodwin v. Johnson**, 132 F.3d at 174; **Carter v. Johnson**, 131 F.3d at 463; **Ransom v. Johnson**, 126 F.3d at 721; **Lackey v. Johnson**, 116 F.3d at 152; **Vuong v. Scott**, 62 F.3d 673, 685 (5th Cir.), **cert. denied**, 516 U.S. 1005 (1995); **Armstead v. Scott**, 37 F.3d 202, 207 (5th Cir. 1994), **cert. denied**, 514 U.S. 1071 (1995).

[220] **Lockhart v. Fretwell**, 506 U.S. at 372. Thus, prejudice is measured by current law and not by the law as it existed at the time of the alleged error. See **Goodwin v. Johnson**, 132 F.3d at 172 n.5; **Westley v. Johnson**, 83 F.3d at 723 (citing **Lockhart v. Fretwell**, 506 U.S. at 372-73).

result of the proceeding would have been different and that the defendant's trial was thereby rendered fundamentally unfair or unreliable.[221]

Insofar as petitioner argues his trial counsel rendered ineffective assistance in some manner in connection with Dr. Rast's testimony, that effort fails for two reasons. First, petitioner has failed to identify anything else his trial counsel could or should have done in terms of objecting or responding to Dr. Rast's testimony. In short, petitioner has failed to identify any deficiency in the performance of his counsel with regard to the admission of Dr. Rast's testimony. Petitioner's trial counsel made a timely objection to Dr. Rast's testimony and cross-examined Dr. Rast extensively. Petitioner has not identified any additional questions or areas he now claims his trial counsel should have explored during cross-examination

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[221] See **Kimmelman v. Morrison**, 477 U.S. 365, 375 (1986); **Darden v. Wainwright**, 477 U.S. at 184; and **William v. Collins**, 16 F.3d 626, 631 (5th Cir.), **cert. denied**, 512 U.S. 1289 (1994). In the course of the latter portion of this inquiry, the Court must consider not merely whether the outcome of the defendant's case would have been different but also whether counsel's deficient performance caused the outcome to be unreliable or the proceeding to be fundamentally unfair. See **Lockhart v. Fretwell**, 506 U.S. at 368-73; **Green v. Johnson**, 160 F.3d at 1036; **Goodwin v. Johnson**, 132 F.3d at 174 (holding that the presence or absence of prejudice, both at trial and on appeal, hinges upon the fairness of the trial and the reliability of the judgment of conviction resulting therefrom); **Carter v. Johnson**, 131 F.3d at 463; **Ransom v. Johnson**, 126 F.3d at 721; **Armstead v. Scott**, 37 F.3d at 207.

of Dr. Rast. Under such circumstances, petitioner's ineffective assistance claim fails to satisfy the first prong of **Strickland**.

Second, given the overwhelming evidence regarding petitioner's long history of violent criminal activity, both while free and during periods of custodial detention, including two attempts at murdering jail guards in the course of escape attempts and repeated threats to return and "get" other jail guards if he were ever to see freedom, there is no probability that, but for the failure of petitioner's trial counsel to more thoroughly cross-examine Dr. Rast or to request a continuance, the outcome of the punishment phase of petitioner's 1981 trial would have been any different. Likewise, the failure of petitioner's trial counsel to more extensively cross-examine Dr. Rast did not render the outcome of the punishment phase of petitioner's trial either unreliable or fundamentally unfair. Petitioner's repeated violent assaults on jail guards while in custody awaiting trial and his threats to "get" other guards if he ever did see freedom rendered the jury's answer to the future dangerousness issue all but a forgone conclusion. The only mitigating evidence petitioner presented at trial was limited to testimony establishing either the nearly idyllic childhood petitioner's experienced, petitioner's artistic and poetic talents, petitioner's kind nature, or petitioner's repeated religious conversions which pre-dated his most violent escape attempts.

For the foregoing reasons, petitioner's complaints about the performance of his trial counsel vis-a-vis Dr. Rast fail to satisfy either prong of **Strickland**.

Likewise, the strategic rationale underlying the tactical decision by petitioner's trial counsel not to pursue

potential evidence petitioner suffered from child abuse or sexual abuse did not render the performance of said counsel professionally deficient [222]

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[222] See **Crane v. Johnson**, 178 F.3d at 313-14 (holding that trial counsel's failure to develop and present purportedly mitigating evidence regarding defendant's mental impairment was reasonable strategic decision where trial counsel investigated defendant's mental impairment and concluded that evidence of same would defeat trial strategy of attempting to obtain a favorable jury response to future dangerousness issue and might have opened door to harmful evidence regarding the defendant's rages and violent tendencies); **Rector v. Johnson**, 120 F.3d at 564 (holding that failure to present mitigating evidence is not a per se showing of ineffective assistance if based on well informed, strategic decisions); **Wilkerson v. Collins**, 950 F.2d at 1065 (holding the same); **Garland v. Maggio**, 717 F.2d at 206 ("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.")

Petitioner's lead trial counsel, attorney Allen Cazier, testified extensively at the hearing in petitioner's state habeas corpus proceeding that (1) his interviews with the petitioner and petitioner's family revealed no history of child abuse, sexual abuse, learning disabilities, mental retardation, or a deprived background, (2) evidence the petitioner suffered abuse as a child would have dove tailed with the prosecution's strategy at the punishment phase of trial to show the petitioner was a sociopath, (3) defense counsel attempted to introduce evidence at trial which negated the prosecution's claim the petitioner

was a sociopath, (4) defense counsel did not pursue mental health evidence for fear it would be used against petitioner at trial, and (5) he never came across any evidence showing the petitioner was insane or suffering from any mental defect at the time of his offense. See State Habeas hearing, Volume V of VIII, testimony of Allen Cazier at pp. 517-20, 526-27, 529-32, 567-68, 576-77, 579-80, 591-92, 595, 597-99, 601, 603, 605-06, 610, and 612. In sum, there was ample evidence presented to the state habeas court establishing that the failure of petitioner's trial counsel to pursue, develop, and introduce evidence the petitioner was abused as a child was a reasonable, tactical one.

b. **Teague** Foreclosure

Respondent correctly argues that in **Gray v. Netherland**,[223] the Supreme Court held, under facts remarkably similar to those surrounding the trial court's admission of Dr. Rast's testimony, that there is no federal constitutional rule requiring disclosure of all of the prosecution's evidence prior to trial and that exclusion of a witness's testimony, as opposed to a continuance, is not necessarily mandatory when a defendant is confronted with an allegedly surprise witness. Petitioner's complaints about the admission of Dr. Rast's testimony are virtually identical to those the Supreme Court held in **Gray** were barred by the non-retroactivity doctrine of **Teague**. In fact, petitioner's trial counsel had far more specific notice regarding the nature of the allegedly surprise witness, i.e., Dr. Rast, than did the defendant's attorneys in **Gray**. Petitioner's fifth claim for relief is barred by **Teague**.

c. Harmless Error

Regardless of whether petitioner bases his fifth claim on Sixth Amendment effective representation grounds or relies on purely due process principles, for the reasons set forth below, the admission of the testimony of Dr. Rast most certainly did not have a substantial and injurious effect or influence on the jury's verdict at either stage of petitioner's trial.[224] As explained in detail above, petitioner's trial counsel was aware the prosecution would attempt to elicit expert testimony regarding petitioner's future dangerousness and

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[223] 518 U.S. 152, 167-69 (1996).

[224] See **Woods v. Johnson**, 75 F.3d at 1029-30(holding harmless alleged error under **Estelle v. Smith**).

was amply prepared to meet that testimony with published materials and reports establishing the difficulty mental health experts experienced up to that time predicting future dangerousness. Furthermore, Dr. Rast's substantive testimony was little more than a conclusion, based upon a hypothetical that generally tracked the evidence, that a person who had repeatedly committed acts of violence, both while free and in custody, was likely to continue to do so. Given the overwhelming evidence regarding the petitioner's future dangerousness, the admission of Dr. Rast's testimony did not have a substantial and injurious effect on the jury's verdict at the punishment phase of petitioner's trial.

3. AEDPA Review

Because petitioner's complaints about the admission of Dr. Rast's testimony do not establish a violation of either petitioner's due process right to a fair trial, his right to avoid compulsory self-incrimination, or his right to effective assistance of counsel, the Texas Court of Criminal Appeals acted reasonably in denying relief when petitioner presented the same claims to that court. Petitioner's fifth claim for relief is also barred by **Teague**. Under such circumstances, the state court's rejection of petitioner's fifth claim for relief was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's fifth claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

The evidence regarding the deliberate nature of petitioner's offense and petitioner's propensity for future, violent, criminal conduct was so overwhelming that the allegedly erroneous admission of Dr. Rast's testimony was harmless. Furthermore, petitioner's fifth claim for relief is foreclosed by the holding in **Teague**. Moreover, because Dr. Rast never interviewed petitioner and did not attempt to rely upon any information obtained through an uncounseled, un-**Mirandized**, interview or examination, petitioner's Fifth and Sixth Amendment claims are non sequitur.

F. Erroneous Admission of Sundry Evidence

1. The Claims

In his sixth and ninth claims for relief, petitioner complains about the admission of testimony regarding petitioner's Federal Youth Corrections Act conviction, extraneous criminal conduct by petitioner, allegedly inflammatory evidence regarding petitioner's relationship to the three underage prostitutes with whom he was traveling at the time he murdered the two unarmed security guards, and purported victim impact evidence.[225]

2. De Novo Review

a. Constitutional Standard

As explained above, a federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling also violates a specific federal constitutional

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[225] See Amended Petition at pp. 74-81 and 100-09; Reply Memorandum at pp. 17-18 and 20-21.

right or renders the petitioner's trial fundamentally unfair.[226] "A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render the petitioner's trial fundamentally unfair."[227] When a federal court reviews state court evidentiary rulings on a petition for habeas corpus, it will grant relief only if the state court error is sufficiently egregious as to render the entire trial fundamentally unfair.[228] The challenged evidence must be a crucial, critical, or highly significant factor in the context of the entire case.[229] The test to determine whether a trial error makes a trial fundamentally unfair is whether there is a

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[226] **Johnson v. Puckett**, 176 F.3d 809, 820 (5th Cir. 1999); **Little v. Johnson**, 162 F.3d at 860; **Green v. Johnson**, 160 F.3d at 1047; **Lucas v. Johnson**, 132 F.3d at 1079; **Gochicoa v. Johnson**, 118 F.3d at 446; **Cupit v. Whitley**, 28 F.3d at 536; **Andrade v. McCotter**, 805 F.2d at 1193.

[227] **Johnson v. Puckett**, 176 F.3d at 820; **Pemberton v. Collins**, 991 F.2d at 1226.

[228] **Castillo v. Johnson**, 141 F.3d at 224; **Neal v. Cain**, 141 F.3d at 214; **Pemberton v. Collins**, 991 F.2d at 1226; **Jernigan v. Collins**, 980 F.2d at 298; **Edwards v. Lynaugh**, 882 F.2d at 164; **Bridge v. Lynaugh**, 838 F.2d at 772; **Mullen v. Blackburn**, 808 F.2d at 1145; **Dillard v. Blackburn**, 780 F.2d at 513.

[229] **Puckett v. Johnson**, 176 F.3d at 821; **Little v. Johnson**, 162 F.3d at 862; **Green v. Johnson**, 160 F.3d at 1047; **Neal v. Cain**, 141 F.3d at 214; **Lucas v. Johnson**, 132 F.3d at 1079; **Jernigan v. Collins**, 980 F.2d at 298; **Bridge v. Lynaugh**, 838 F.2d at 772; **Thomas v. Lynaugh**, 812 F.2d at 230; **Mullen v. Blackburn**, 808 F.2d at 1145.

reasonable probability the verdict might have been different had the trial been properly conducted.[230]

b. Petitioner's 1973 Federal Conviction

Petitioner argues the trial court erred in admitting, at the punishment phase of his trial, evidence regarding petitioner's 1973 Federal Youth Corrections Act (FYCA) conviction for possession of stolen mail. Petitioner argues this conviction was "automatically set aside" in 1979 and should not have been admitted for any purpose.

First, contrary to the premise underlying petitioner's complaint about the admission of testimony regarding his FYCA conviction, federal law did not provide that a defendant, such as petitioner, who was discharged from probation or parole under the FYCA received an automatic expungement of his conviction.[231] Petitioner's reliance on the Fifth Circuit's holding in **United States v. Arrington**,[232] is

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[230] See **Guidroz v. Lynaugh**, 852 F.2d at 835; **Rogers v. Lynaugh**, 848 F.2d at 609.

[231] Former Section 5021(a) of Title 18, United States Code, provided as follows:

(a) Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.

75 Stat. 750 (emphasis added).

[232] 618 F.2d 1119 (5th Cir. 1980) , **cert. denied**, 449 U.S. 1086 (1981).

misplaced. The United States Supreme Court expressly rejected the interpretation of the FYCA the Fifth Circuit employed in **Arrington** when it held in **Tuten v. United States**,[233] that a youth offender convicted and sentenced under the terms of the FYCA had to be discharged prior to the maximum sentence actually imposed to be entitled to the automatic expungement provision of Section 5021(a). Furthermore, the principal precedent relied upon by the Fifth Circuit in **Arrington**, i.e., **Minshew v. United States**,[234] actually held that to be entitled to automatic expungement under the FYCA, a youth offender must be discharged before the maximum term of his sentence imposed. Likewise, in **Dorszynski v. United States**,[235] the United States Supreme Court recognized that the Division's discretionary authority to discharge a youth offender unconditionally before it was required to do so is what triggered the automatic expungement provision of Section 5021. In short, the holding in **Arrington** on which petitioner relies, was subsequently rejected by the Supreme Court and, therefore, not controlling. Petitioner is not entitled to the benefit of the automatic expungement provisions of the former FYCA because he was never discharged early from his FYCA sentence. On the contrary, petitioner's former federal parole officer testified at petitioner's trial petitioner was not discharged early and that no certificate of expungement was made in petitioner's

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[233] 460 U.S. 660, 666-68 (1983).

[234] 410 F.2d 396, 397 (5th Cir. 1969).

[235] 418 U.S. 424, 435 (1974).

case.[236] Thus the factual and legal premise for petitioner's sixth claim for relief herein is not present.

Second, the applicable Texas statutes governing the admission of evidence at petitioner's 1981 trial allowed admission of evidence of any probated or suspended sentence at the punishment phase of trial.[237] Petitioner has not alleged any legitimate legal basis for excluding evidence of his 1973 FYCA conviction from the punishment phase of his 1981 trial. It is well-settled that under the Texas capital sentencing scheme, the admission of evidence of extraneous, unadjudicated offenses at the punishment phase of a Texas capital murder trial does not violate a defendant's constitutional rights.[238] Nothing in Texas law requires that there be a final conviction in order for extraneous offenses to be admissible at the punishment phase of a capital murder trial.[239] Furthermore, the prosecution need not prove beyond a

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[236] See S.F. Trial, Volume 6, testimony of Robert Mitchell at pp. 66-68. Mr. Mitchell also testified that the petitioner was considered a high risk prisoner. **Id.** at p. 65.

[237] See **Hogue v. Johnson**, 131 F.3d at 478 n.16.

[238] See **Harris v. Johnson**, 81 F.3d at 541; **Montoya v. Scott**, 65 F.3d at 421; **Kinnamon v. Scott**, 33 F.3d at 466; **Clark v. Collins**, 19 F.3d at 966; **Duff-Smith v. Collins**, 973 F.2d at 1184; **Landry v. Lynaugh**, 844 F. 2d 1117, 1121 (5th Cir.), **cert. denied**, 488 U.S. 900 (1988); **Williams v. Lynaugh**, 814 F.2d 205, 207-08 (5th Cir.), **cert. denied**, 484 U.S. 935 (1987); **Milton v. Procunier**, 744 F.2d 1091, 1097 (5th Cir. 1984), **cert. denied**, 471 U.S. 1030 (1985).

[239] See **Hogue v. Johnson**, 131 F.3d at 478 n.16.

reasonable doubt the defendant committed the unadjudicated extraneous offenses entered into evidence at the punishment phase of a Texas capital murder trial.[240] If admission of evidence regarding extraneous, unadjudicated, criminal conduct is admissible at the punishment phase of a Texas capital murder trial, certainly no barrier exists to admission of evidence of a federal crime committed when the defendant was seventeen. Petitioner's citations to opinions addressing the peculiar conundrums that arise in weighing states are of little value here because Texas is not a weighing state.[241] Petitioner has not identified any legitimate legal basis for excluding evidence of his 1973 conviction from the punishment phase of his 1981 capital murder trial.

Third, given the overwhelming evidence establishing petitioner's penchant for continued violence even after his placement in custodial detention,[242] and petitioner's track

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[240] See **Vega v. Johnson**, 149 F.3d 354, 359 (5th Cir. 1998), **cert. denied**, 525 U.S. 1119 (1999) (holding that extraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt); **Turner v. Johnson**, 106 F.3d 1178, 1189 (5th Cir. 1997).

[241] See **Hogue v. Johnson**, 131 F.3d at 498-99 n.60.

[242] In addition to petitioner's many violent attacks upon jail guards summarized above, there was also testimony at the punishment phase of his 1981 capital murder trial that (1) the petitioner's reputation for being peaceful and law-abiding in his home town of Oklahoma City was bad, see S.F. Trial, Volume 6, testimony of Robert Jones at p. 53, and (2) during his capital murder trial, the petitioner was found in possession of a broken mirror and a five foot

record of violent offenses prior to his pretrial detention,[243] there is no possibility, much less any probability, that the admission of evidence regarding an eight-year-old conviction for possession of stolen mail had any substantial and injurious impact on the outcome of the punishment phase of petitioner's trial. In short, admission of evidence regarding petitioner's conviction for possession of stolen mail added virtually nothing on the issue of future dangerousness to the largely undisputed evidence that petitioner (1) led a gang that robbed four elderly people and raped an elderly woman, (2) mercilessly gunned down, after robbing, two unarmed guards in a San Antonio stairwell, (3) made two attempts to murder jail guards and escape while in custody, (4) assaulted and threatened to assault other guards on numerous occasions while in custody, and (5) was found in possession of a broken mirror and extension cord during his capital murder trial. Any error in the admission of evidence regarding petitioner's 1973 conviction was harmless as a matter of federal law.[244]

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extension cord, neither of which petitioner was authorized to possess in the Bexar County Jail, see S.F. Trial, Volume 6, testimony of Richard R. Campbell at pp. 145-48.

[243] Mary Wilkinson testified concerning the petitioner's robbery and rape of her in January, 1979. See S.F. Trial, Volume 6, testimony of Mary Wilkinson at pp. 171-77 and 182.

[244] See **Hogue v. Johnson**, 131 F.3d at 500-02 (holding harmless the admission of evidence of a prior conviction under the **Brecht** standard in circumstances not unlike those involving petitioner's 1973 FYCA conviction).

In the context of petitioner's entire 1981 trial, the evidence regarding his 1973 conviction was not a crucial, critical, or highly significant factor and did not render petitioner's entire trial fundamentally unfair.

c. Extraneous Offense Evidence

Petitioner complains in his ninth claim for relief about admission of evidence (1) relating to the murder of Howard Powers, (2) referring to petitioner's underage female traveling companions as "prostitutes" and the petitioner as a "pimp," (3) petitioner's assault upon Lisa Laursen, and (4) petitioner bragging that he had been to prison and wore jewelry from prior robberies.

After careful review of the entire record from the petitioner's trial, this Court concludes the admission of the foregoing evidence was not a crucial, critical, or highly significant factor in the context of petitioner's trial and did not render petitioner's entire trial fundamentally unfair.

There was nothing "extraneous" about the evidence of petitioner's murder of Powers. It is difficult to imagine how evidence of petitioner's virtually simultaneous murder of both Ebbert and Powers at the same location during the course of the same robbery could have been separated. The jury needed to understand the circumstances surrounding petitioner's murder of Powers in order to make sense of the petitioner's murder of Ebbert. Petitioner murdered both his victims at the same place, in the same manner, almost simultaneously. Clearly, petitioner's murders of both his victims were inextricably intertwined from an evidentiary and practical

standpoint.[245] Petitioner's complaints about the extensive testimony regarding Powers' autopsy likewise misses the mark. Testimony regarding Powers' death was relevant to preclude any defense argument that petitioner acted in self-defense when he fatally shot Ebbert and Powers. The autopsy testimony precluded any claim that either Powers or Ebbert were behaving aggressively when petitioner shot them and tended to corroborate the testimony of Franklin and Bearden regarding the petitioner's confessions to them that he shot his victims after they handed over their wallets and while they begged for their lives. The evidence showing the brutality of the murder of both victims was also relevant to avoid any claim petitioner had acted negligently or the shootings had been accidental.

Likewise, this Court finds no rational means whereby the eyewitness testimony of prosecution witnesses Franklin, Bearden, and Laursen could have been admitted without at least some mention being made of the illicit business relationship between petitioner and these three minor females. The fact that Laursen, Franklin, and Bearden were prostitutes who worked for the petitioner was clearly relevant to the issue of their credibility as trial witnesses against the petitioner.

Petitioner's complaints that the prosecution referred to him at trial as "Silky" are likewise without merit. Not only did Franklin and Bearden testify that they knew the petitioner as "Silky,"[246] but at least one of the ministers who visited

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[245] See **Neal v. Cain**, 141 F.3d at 214 (recognizing that a defendant's sexual assaults upon his kidnap victim were part of the res gestae of the kidnapping).

[246] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden at pp. 256 and 336; Volume 5, testimony of Lisa

petitioner in the Denver Jail testified that petitioner went by that name while in that facility.[247]

Evidence regarding petitioner's assault upon Laursen was clearly admissible on the issue of her credibility as a witness against the petitioner. She admitted to harboring a deep-seated resentment against petitioner arising from the way he had treated her.[248]

As for Laursen's testimony that petitioner told her he had been to prison and the jewelry he wore he obtained in previous robberies, defense counsel promptly objected to both of those statements, and the trial court sustained both objections and directed the jury to disregard same.[249] Juries are presumed to follow the instructions of the trial court.[250]

Laursen at p. 81; and Volume 5, testimony of Victoria Ann Franklin at pp. 166 and 188.

[247] See S.F. Trial, Volume 6, testimony of Lee Griswold at p. 88.

[248] See S.F. Trial, Volume 5, testimony of Lisa Laursen at p. 83.

[249] See S.F. Trial, Volume 5, testimony of Lisa Laursen at pp. 72-74.

[250] See **Zafiro v. United States**, 506 U.S. 534, 540, (1993); **United States v. Fletcher**, 121 F.3d 187, 197 (5th Cir. 1997), **cert. denied**, 522 U.S. 1063 (1998); **United States v. Torres**, 114 F.3d 520, 526 (5th Cir.), **cert. denied**, 522 U.S. 922 (1997); **United States v. Levine**, 80 F.3d 129, 136 (5th Cir.), **cert. denied**, 519 U.S. 824 (1996); **Vuoncg v. Scott**, 62 F.3d 673, 685 (5th Cir.), **cert. denied**, 516 U.S. 1005 (1995).

Laursen's testimony and the trial court's prompt instructions that the jury disregard same must be viewed in the context of the largely uncontested evidence regarding the petitioner's numerous confessions to his murder of the two unarmed security guards. When so examined, Laursen's comments petitioner told her he had been to prison and wore jewelry from prior robberies did not render petitioner's entire trial fundamentally unfair. Laursen clearly bore petitioner ill-will and admitted as much during her cross-examination. In the context of the guilt-innocence phase of the petitioner's trial, the admission of testimony regarding Laursen's animosity toward petitioner and the reasons therefor, as with the evidence regarding petitioner's illicit business relationship with Franklin and Bearden, did not render petitioner's trial fundamentally unfair. That evidence was relevant with regard to the credibility of the three teenage prostitutes who traveled with the petitioner and later testified against him at trial.

Finally, given the overwhelming evidence of petitioner's guilt, which even now petitioner does not seriously contest, assuming there was some error in the admission of the "extraneous" offense evidence discussed above, the admission of that evidence did not have a substantial and harmful effect on the outcome of the guilt-innocence phase of petitioner's trial. Virtually everything of an incriminating nature petitioner told to either Franklin, Bearden, or Laursen, petitioner also disclosed to prosecution witness Mark Stanley Seiver, who also testified against petitioner at the guilt-innocence phase of trial. There was no serious doubt the murder weapon was the same make and model .38 caliber handgun petitioner purchased through Rivers Campbell in Galveston just days before the murders. The petitioner offered no evidence establishing that any of his three traveling companions were present when the petitioner fired the fatal shots, much less that any of them knew about

the murders until petitioner told them or they saw reports on the television. Petitioner did not dispute the testimony showing he displayed money to his three underage female companions and told them he had obtained it from the victims before he shot them. Under such circumstances, the admission of the evidence regarding Powers' murder, petitioner's relationship to his teenage companions, and petitioner's assault upon Laursen did not render petitioner's trial fundamentally unfair or have a substantial and injurious effect on the outcome of the guilt-innocence phase of petitioner's trial.

d. Victim Impact "Evidence"

(1) The Record

Petitioner's complaints about the admission of "victim impact evidence" are actually concerns about remarks made by the prosecution during opening and closing arguments at the guilt-innocence phase of petitioner's trial [251]

For instance, petitioner complains that, during opening statements at the guilt-innocence phase of trial, the prosecution mentioned petitioner left the five children of Howard Powers without a father when petitioner murdered

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[251] Even if there had been actual evidence, rather than merely jury arguments referring to the victims' families, the Supreme Court's holding in **Payne v. Tennessee**, 501 U.S. 808, 825-26 (1991), overruled the Court's previous precedents barring both the admission of evidence of the impact of a capital murder on the victim and his or her survivors, as well as jury argument regarding same made by prosecutors, at the punishment phase of a capital murder trial.

Powers.[252] Likewise, petitioner complains the prosecution also that John Ebbert left behind a two-month-old child. However, the state trial court granted defense counsel's objection to the prosecutor's reference to Powers' children and directed the jury to disregard same.[253] Moreover, petitioner did not object to the prosecutor's reference to Ebbert's child.[254]

In closing arguments at the guilt-innocence phase of trial, the prosecution made a brief reference to the victims' families: "It's hard to reflect upon the fact that those two men were loved. They were respected. They were relied upon by their families."[255] Later, in the course of responding to defense counsel's argument the two victims had voluntarily handed over their money to petitioner while he held them at gun point, the prosecution argued the victims had been coerced to do so: "Naturally these men were coerced. They wanted to live. They like you felt a responsibility to their families and they like you wanted to go home again to their families. They didn't."[256] There was no objection to either of those remarks.

Thus, the essence of this final aspect of petitioner's ninth claim for relief is a series of complaints about four instances of prosecutorial jury argument, to one of which

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[252] See S.F. Trial, Volume 4 at pp. 15-16.

[253] **Id.**

[254] See **Id.** at p. 16.

[255] See S.F. Trial, Volume 5 at p. 239.

[256] **Id.** at p. 244.

defense counsel objected and the trial court sustained that objection and directed the jury to ignore same, and the other three to which defense counsel voiced no objection whatsoever.

(2) The Constitutional Standard

An improper prosecutorial argument that does not implicate a specific constitutional provision is not cognizable on collateral review unless the defendant shows an abridgment of due process, i.e., the improper argument rendered the proceeding fundamentally unfair.[257] Improper jury argument by the state does not present a claim of constitutional magnitude in a federal habeas action unless it is so prejudicial that the state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment [258] To establish a prosecutor's remarks are so inflammatory, petitioner must demonstrate the misconduct is persistent and pronounced or

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[257] See **Ables v. Johnson**, 73 F.3d 591, 592 n.2 (5th Cir.), **cert. denied**, 517 U.S. 1198 (1996); **Ward v. Whitley**, 21 F.3d 1355, 1364 (5th Cir. 1994), **cert. denied**, 513 U.S. 1192 (1995); **Bagley v. Collins**, 1 F.3d 378, 380 (5th Cir. 1993).

[258] See **Darden v. Wainwright**, 477 U.S. 168, 181 (1986); **Ables v. Johnson**, 73 F.3d at 592 n.2; **Nichols v. Scott**, 69 F.3d at 1278 ("the relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'" (quoting **Darden**)); **Jones v. Butler**, 864 F.2d 348, 356 (5th Cir. 1988), **cert. denied**, 490 U.S. 1075 (1989); **Byrne v. Butler**, 845 F.2d 501, 507 (5th Cir.), **cert. denied** 487 U.S. 1242 (1988).

that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper remarks [259] "[A] prosecutor's remarks must be more than undesirable or even universally condemnable before reversal is warranted. Instead, the prosecutor's remarks must infect the trial with such unfairness as to make the resulting conviction a denial of due process."[260] "A prosecutor's improper argument will, in itself, exceed constitutional limitations in only the most egregious cases."[261] The burden is on the

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[259] See **Turner v. Johnson**, 106 F.3d 1178, 1188 (5th Cir. 1997); **Jones v. Butler**, 864 F.2d at 356 (citing **Felde v. Blackburn**, 795 F.2d 400, 403 (5th Cir. 1986), **cert. denied**, 484 U.S. 873 (1987)); **Byrne v. Butler**, 845 F.2d at 508.

[260] **Bell v. Lynaugh**, 828 F.2d 1085, 1095 (5th Cir.), **cert. denied**, 484 U.S. 933 (1987)(citing **Darden v. Wainwright**, 477 U.S. 168, 181 (1986)); see also **Nichols v. Scott**, 69 F.3d at 1278 (wholly apart from the issue of procedural bar, failure to object to an argument is an indication that it was not perceived as having a substantial adverse effect or would not naturally and necessarily be understood as advancing improper considerations)(citing **Milton v. Procunier**, 744 F.2d 1091, 1095 (5th Cir. 1984), **cert. denied**, 471 U.S. 1030 (1985)); **Buxton v. Collins**, 925 F.2d 816, 825 (5th Cir.), **cert. denied**, 498 U.S. 1128 (1991) (recognizing that the four proper areas for prosecutorial jury argument are summation of the evidence, reasonable inference from the evidence, answers to opposing counsel's argument, and pleas for law enforcement).

habeas petitioner to show a reasonable probability that but for the prosecutor's remarks the result of the trial would have been different.[262]

(3) Synthesis

For the reasons discussed at length above, the evidence of petitioner's guilt introduced at the guilt-innocence phase of trial included not merely the circumstantial evidence establishing petitioner had the motive, the means, and the opportunity to commit the crime of capital murder, but that he bragged about the commission of his offense to Franklin, Bearden, and Seiver. In addition, the evidence established that the petitioner directed Franklin to the crime scene, directed Franklin to dispose of inculpatory evidence and conceal the murder weapon, and showed both Franklin and Bearden the money he obtained in the course of his robbery and murder of Ebbert and Powers. When viewed in proper context, the prosecutor's brief references to the victims' children in his opening jury argument did not render petitioner's trial fundamentally unfair. The trial court directed the jury to disregard the first of those remarks and the jury is presumed to have done so. Petitioner's trial counsel failed to object to the second of those remarks.

The comments of the prosecutor during the closing argument at the guilt-innocence phase of trial were a proper response to defense counsel's contention that the victims had

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[261] **Ortega v. McCotter**, 808 F.2d 406, 410 (5th Cir. 1987)(citing **Menzies v. Procunier**, 743 F.2d 281, 288-89 (5th Cir. 1984)(Houston v. Estelle, 569 F.2d at 382)).

[262] **Nichols v. Scott**, 69 F.3d at 1278; **Felde v. Blackburn**, 795 F.2d at 403.

"voluntarily" handed over their money to petitioner without regard to the fact petitioner was then holding them at gun point. The prosecutor merely reminded the jury of the many reasons the two victims had to live. In any event, the prosecutor's passing references to the victims' families did not render the guilt-innocence phase of petitioner's trial fundamentally unfair.

e. Harmless Error

Alternatively, this Court concludes that neither the admission of any of the evidence referred to in petitioner's sixth or ninth claims for relief, nor any of the prosecutorial arguments about which petitioner complained in his ninth claim for relief had a substantial and injurious effect on the outcome of either phase of petitioner's 1981 trial. The evidence against petitioner at both phases was overwhelming. Furthermore, insofar as petitioner complains about the admission or consideration by the jury of victim impact evidence or prosecutorial jury argument regarding same during the punishment phase of trial, that complaint is frivolous.[263]

3. AEDPA Standard

In view of the foregoing authorities, findings, and conclusions, the Texas Court of Criminal Appeals' rejection of petitioner's sixth and ninth claims for relief in this cause was the product of neither an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the state court

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[263] See **Payne v. Tennessee**, 501 U.S. at 825-26; **Black v. Collins**, 962 F.2d at 408.

proceeding. Therefore, petitioner's sixth and ninth claims do not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner's complaints about the admission of evidence regarding his 1973 conviction at the punishment phase of his trial disregard the overwhelming evidence of both the deliberate nature of his crimes and petitioner's wanton disregard for human life and the rights of others amply evidenced by his history of violent criminal conduct. Likewise, petitioner's complaints about the admission of evidence regarding Powers' murder, petitioner's relationship to his three underage female traveling companions, and petitioner's acts of violence in their presence do not satisfy the standard for federal habeas relief because that evidence did not render petitioner's trial fundamentally unfair. Moreover, the trial court sustained defense counsel's objections to much of the testimony and argument about which petitioner complains and directed the jury to disregard same. When viewed in the context of the overwhelming evidence of petitioner's guilt and the overwhelming evidence supporting affirmative answers to the two special sentencing issues at the punishment phase of petitioner's trial, none of petitioner's complaints in his sixth or ninth claims for relief warrants federal habeas relief under either a de novo standard or the AEDPA's more narrow form of review. Furthermore, when viewed in light of all the undisputed facts and uncontroverted evidence, all of petitioner's complaints in his sixth and ninth claims herein rise no further than that of harmless error.

G. Delay in Carrying Out Petitioner's Execution

1. The Claim

In his seventh claim for relief, petitioner argues, without citation to any on-point authority, that executing him after he has spent almost two decades on death row somehow violates the Eighth Amendment because most of that delay was attributable to the meandering pace of activity in the Texas appellate courts.[264]

2. De Novo Review

Petitioner has filed several appeals and habeas corpus proceedings. The Texas Court of Criminal Appeals correctly concluded that virtually all of the delay about which the petitioner complains is attributable solely to the efforts of the petitioner to have his conviction or sentence reversed by the state or federal appellate courts.[265]

a. Teague Foreclosure

The Fifth Circuit has consistently rejected the petitioner's complaint about delay in carrying out the execution of a death sentence as foreclosed by the holding in **Teague**.[266]

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[264] See Amended Petition at pp. 82-95; Reply Memorandum at pp. 18-19.

[265] See State Habeas Records, Volume Four, Order of October 1, 1997, at pp. 9-10.

[266] See **Lackey v. Johnson**, 83 F.3d 116, 117 (5th Cir.), **cert. Denied**, 519 U.S. 911 (1996); **White v. Johnson**, 79 F.3d 432, 437-39 (5th Cir.), **cert. denied**, 519 U.S. 911 (1996); **Lackey v. Scott**, 28 F.3d 486, 492 (5th Cir. 1994), **cert. denied**, 513 U.S. 1086 (1995).

b. No Merit on the Merits

The Fifth Circuit has also repeatedly rejected it on the merits, holding "there are compelling justifications for the delay between conviction and the execution of a death sentence."[267] As the Fifth Circuit has noted:

> "The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as [petitioner] to challenge their convictions for years. [Petitioner] has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights. Throughout this process [petitioner] has had the choice of seeking further review of his conviction and sentence or avoiding further delay of his execution by not petitioning for further review or by moving for expedited consideration of his habeas petition.
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> Even if much of the delay in this case is the fault of Texas, [petitioner] cannot now complain of cruel and unusual punishment. [Petitioner] made no effort to inform the Texas

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[267] See **White v. Johnson**,79 F.3d at 439; see also **Barber v. Johnson**, 145 F.3d 234, 237 (5th Cir.), **cert. denied**, 119 S. Ct. 518 (1998)(rejecting without comment a claim identical to that raised in **White** and **Lackey**).

> courts that their delay was detrimental to him or to ask for expedited review of his petition and we cannot fault them for assuming that [petitioner] would be grateful for, or at least, indifferent to the delay. [Petitioner] cannot expect Texas courts to know that he wants to get on with his execution without telling them. A motion for expedited review is also necessary so that reviewing courts can distinguish between strategic behavior on the part of the prisoner who quietly waits with the hope of asserting a Lackey claim later and bona fide claims of malicious or intentional state delay. [Petitioner] fails to allege that the delay in his case is due to anything other than court backlog and does not offer any evidence that Texas' delay in considering his petition was intentional or even negligent."[268]

Petitioner does not allege he ever sought expedited review of his state direct appeal or state habeas corpus proceeding. Likewise, petitioner "alleges no extraordinary facts or unusual conditions beyond the inevitable anxiety of waiting for an execution date which cannot be avoided in a system of capital punishment."[269] There was considerable testimony at petitioner's state habeas corpus hearing regarding the conditions under which petitioner has been held on death row at the Ellis One Unit, until recently the sole

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[268] **White v. Johnson**, 79 F.3d at 439 (citation omitted).

[269] **Id.**

death row in Texas for male prisoners.[270] However, none of that testimony raised any non-frivolous issue regarding the constitutionality of the conditions of petitioner's confinement during his stay on Texas' death row. More specifically, petitioner offered no evidence to show he has suffered any extraordinary emotional or psychological harm above and beyond that which necessarily befalls a person sentenced to death.[271] Under such circumstances, petitioner has failed on the merits to establish his Eighth Amendment rights have been violated by virtue of the delay in carrying out his execution.

3. AEDPA Review

Under such circumstances, the Texas Court of Criminal Appeals' rejection of petitioner's delay argument in the course of petitioner's state habeas corpus proceeding was the product of neither an unreasonable application of clearly

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[270] See State Habeas Hearing, Volume VI of VIII, testimony of Billie West at pp. 696-888; Volume VII-A of VIII, testimony of Gary Claxton at pp. 2-10. Captain West testified that, like other death row inmates, the petitioner has enjoyed access to medical and psychiatric care, adequate food, adequate clothing, a healthy and safe place to live, access to materials from a law library, reading materials, and the opportunity to participate in a work program throughout petitioner's stay on death row. Officer Claxton testified that the petitioner has never expressed any concern for his conditions on death row, has never displayed suicidal tendencies, has never appeared depressed, but has participated in recreational activities and appeared to enjoy same.

[271] **Id.**

established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's seventh claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner's actions in a series of appeals to the United States Supreme Court and in then pursuing state habeas corpus relief on a variety of claims barred by **Teague** are the reason he has not been executed in the more than two decades since petitioner executed Howard Powers and John Ebbert. Petitioner neither alleged nor proved to the state courts he has suffered any extraordinary psychological or emotional distress because of the delay necessarily accompanying his assertion of claims. Petitioner's seventh claim is without merit and also is barred by the holding in **Teague**. Regardless of whether petitioner's seventh claim is reviewed under either a de novo standard or the AEDPA's standard, it does not warrant federal habeas corpus relief in this cause.

H. Texas' Ten/Twelve Rule

1. The Claim

In his eighth claim for relief herein, petitioner argues his constitutional rights were violated by virtue of the impact of section 2(a) of Article 37.071 of the Texas Code of Criminal Procedure on the jury's deliberations at the punishment phase of his capital murder trial.[272]

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[272] See Amended Petition at pp. 96-100; Reply Memorandum at pp. 19-20.

2. De Novo Review

a. No Merit

Petitioner relies primarily upon the Supreme Court's opinion in **Caldwell v. Mississippi**[273] to support his eighth claim for relief. However, **Caldwell** is inapposite to petitioner's case. In **Caldwell**, the Supreme Court addressed an instance in which a capital murder prosecutor's jury argument suggested in an erroneous and misleading manner that the jury was not the final arbiter of the defendant's fate.[274] To establish a **Caldwell** violation, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."[275] In reviewing a **Caldwell** claim, the proper inquiry is whether under all the facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under

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[273] 472 U.S. 320 (1985).

[274] In **Caldwell**, the Supreme Court held the following statement by the prosecution during its closing argument undermined reliable exercise of jury discretion:

> Now, [the defense] would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can they be? Your job is reviewable. They know it.

Caldwell v. Mississippi, **472 U.S. at 325-29.**

[275] **Dugger v. Adams**, 489 U.S. 401, 407 (1989); **Montoya v. Scott**, 65 F.3d at 420; **Sawyer v. Butler**, 881 F.2d 1272, 1285 (5th Cir. 1989), **aff'd sub nom. Sawyer v. Smith**, 497 U.S. 227 (1990).

state law to believe that the responsibility for determining the appropriateness of the imposition of the death penalty rests elsewhere.[276] Nothing in petitioner's punishment phase jury instructions misled petitioner's jury regarding the consequences of their answers to the special sentencing issues.

Petitioner identifies no portion of the prosecutorial argument suggesting that the petitioner's jury would not be the final arbiter of the petitioner's fate. Rather, petitioner argues that the trial court failed to inform the petitioner's jury of the consequence of a hung jury, i.e., the jury's inability to reach unanimity with regard to affirmative answers on the special sentencing issues or to reach a consensus among ten jurors in favor of a negative answer to those same special issues. While a variation upon the theme raised by petitioner's eighth claim for relief has been addressed by the Supreme

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[276] See **Montoya v. Scott**, 65 F.3d at 420(holding that a Texas trial court's instructions during voir dire that were remarkably similar to the prosecution's statements accurately explaining the Texas special sentencing issues in a capital murder trial and the effect of the jury's answers to those issues did not violate the holding in **Caldwell**); **Mann v. Scott**, 41 F. 3d at 984 (holding that a prosecutor's statements during closing argument to the effect that the jury knew that the defendant would not be executed the same night the jury returned its verdict at the punishment phase of trial did not violate the holding in Caldwell); **Sawyer v. Butler**, 881 F.2d at 1286-87.

Court, that court did so in **Mills v. Maryland**,[277] not in **Caldwell**.[278]

Petitioner argues that the punishment phase jury instructions at his trial improperly misled his jury as to the effect of a single "no" vote on any of the special sentencing issues.[279] Petitioner complains implicitly that the state trial court's failure to advise petitioner's jury regarding the effect of a hung jury violated the principle announced by the Supreme Court in **Mills**, because the state trial court, pursuant to a statutory prohibition, failed to inform the jury at the punishment phase of trial as to the effect of a single "no" vote on any of the special sentencing issues. In essence, petitioner complains that individual members of his jury were not

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[277] 486 U.S. 367 (1988).

[278] In **Mills**, the Supreme Court struck down a death sentence imposed by a jury that had been given both a confusing and ambiguous set of instructions and a verdict form which could have been construed to bar the jury's consideration of the defendant's mitigating evidence of his youth, mental infirmity, lack of future dangerousness, and State's failure to attempt to rehabilitate him during his prior incarceration unless the jury agreed unanimously on each mitigating factor. See **Mills v. Maryland**, 486 U.S. at 376-83.

[279] Applicable Texas law at the time of petitioner's trial provided, and still provides that a capital sentencing jury must find unanimously to answer a special issue in a manner that would result in a death sentence but may answer any special issue to the contrary if only ten jurors agree to do so. See TEX. CODE CRIM. PROC. ANN. art. 37.071 (d) (2), (f) (2), & (g) (Vernon Supp. 1999).

furnished with a detailed explanation of exactly what constituted a "hung jury" at the punishment phase of a Texas capital murder trial. However, the Fifth Circuit has expressly rejected this same argument, noting that the law in Texas is completely different from that in **Mills**:

> Under the Texas system, all jurors can take into account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance. Thus, **Mills** is inapplicable.
> The Texas system allows an answer of "Yes" to a special issue if all jurors vote "Yes," and allows an answer of "No" if ten jurors vote "No." **Mills** does not require a certain number of jurors to agree to impose the death penalty.[280]

In order to successfully challenge a state court's jury instructions at the punishment phase of a capital murder trial, a federal habeas petitioner must show more than that a capital sentencing scheme might have resulted in the jury being prevented from considering mitigating evidence; petitioner must show a reasonable likelihood that such actually occurred.[281] In this case, petitioner's argument the jurors at his trial might have concluded from the jury instructions at the punishment phase of trial, that they were precluded from giving effect to their own opinions as to whether petitioner

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[280] **Jacobs v. Scott**, 31 F.3d 1319, 1328-29 (5th Cir. 1994), **cert. denied**, 513 U.S. 1067 (1995).

[281] See **Boyde v. California**, 494 U.S. 370, 380 (1990); **Stewart v. Collins**, 978 F.2d 199, 201 (5th Cir. 1992), **cert. denied**, 507 U.S. 1053 (1993).

merited the death penalty, asserts a construction of the jury charge at the punishment phase of petitioner's trial that is neither reasonable nor likely to have actually occurred.[282] Furthermore, the Fifth Circuit has repeatedly rejected the exact same rule urged by petitioner herein.[283] There is no constitutional right to a jury instruction advising a capital sentencing jury of the effect of a hung jury.[284]

b. **Teague** Foreclosure

Finally, the Fifth Circuit has repeatedly held that expanding the holding in **Mills** to cover the Texas capital sentencing scheme, i.e., adopting the rule advocated by petitioner herein, would amount to adopting a "new rule" of constitutional procedure in the course of this federal habeas corpus proceeding and that the nonretroactivity doctrine of

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[282] See **Johnson v. Texas**, 509 U.S. at 368 ("In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would -- with a 'commonsense understanding of the instructions in the light of all that has taken place at trial.'") (quoting **Boyde v. California**, 494 U.S. 370, 381(1990)).

[283] See **Woods v. Johnson**, 75 F.3d at 1036; **Jacobs v. Scott**, 31 F.3d at 1328-29.

[284] See **United States v. Jones**, 132 F.3d 232, 245 (5th Cir. 1998), **aff'd**, 527 U.S. 373 (1999) (holding that no constitutional violation results from the refusal of a district court to inform the jury of the consequences of failing to reach a unanimous verdict).

Teague forecloses such a result.[285] Expanding the holding in **Caldwell** to reach the same result would also run afoul of the rule in **Teague**. Neither the Supreme Court nor the Fifth Circuit has ever construed **Mills** or **Caldwell** to require the result petitioner requests herein.

3. AEDPA Review

For the reasons set forth above, the Texas Court of Criminal Appeals' rejection of petitioner's challenge to the jury instructions at the punishment phase of petitioner's 1981 capital murder trial was the product of neither an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's eighth claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner possessed no federal constitutional right to an instruction advising the jury of the effect of a hung jury. Nothing in petitioner's punishment phase jury instructions could be reasonably construed as either confusing the jury with regard to the ultimate impact of their verdict or the ability of a single juror to vote his or her conscience based upon the evidence. Petitioner's punishment phase jury

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[285] See **Woods v. Johnson**, 75 F.3d at 1036; **Davis v. Scott**, 51 F.3d 457, 466 (5th Cir.), **cert. denied**, 516 U.S. 992 (1995); **Webb v. Collins**, 2 F.3d 93, 95 (5th Cir. 1993); **Nethery v. Collins**, 993 F.2d at 1162; **Cordova v. Collins**, 953 F.2d 167, 172-73 (5th Cir.), **cert. denied**, 502 U.S. 1067 (1992).

instructions were guilty of neither of the vices condemned in **Caldwell** or **Mills**. Petitioner's eighth claim is not only without merit but also barred by the holding in **Teague**. Regardless of whether petitioner's eighth claim is reviewed under either a de novo standard or the AEDPA standard, it does not warrant federal habeas corpus relief in this cause.

I. Restrictions on Cross-Examination of Bearden

1. The Claims

In his penultimate claim for relief, petitioner argues the trial court erroneously limited the scope of the petitioner's cross-examination of prosecution witness Rhonda Jean Bearden when it refused to allow defense counsel to explore additional details concerning the criminal offenses for which she was incarcerated in Colorado at the time of petitioner's 1981 trial."[286] In addition, petitioner complains the trial court refused to allow petitioner to subpoena Bearden's robbery victims from Colorado to testify as to the details of her crimes in that State.[287]

2. De Novo Review

a. No Merits

(1) The Record Straight

Bearden was not a crucial prosecution witness. Bearden's trial testimony furnished little more than

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[286] See Amended Petition at pp. 109-14; Reply Memorandum at pp. 21-22.

[287] See Amended Petition at p. 111.

corroboration for the much more compelling and far more damaging testimony of Franklin and Laursen. Petitioner does not complain that his ability to cross-examine either Franklin or Laursen was improperly curtailed. While Bearden testified petitioner confessed his crime to her and showed her money he claimed to have obtained during the robbery of his victims, Franklin testified not only to petitioner's confessions but also that petitioner directed her to clean the murder weapon, dispose of evidence, conceal the murder weapon among her belongings, and go to the crime scene the night of the murders to wipe off the petitioner's fingerprints.

At trial, in addition to corroborating the testimony of Franklin and Laursen regarding the group's activities in Galveston, Corpus Christi, and San Antonio, Bearden testified petitioner did not confess his robbery and murder of the two guards to her until after the group left San Antonio, and Franklin later corroborated the petitioner's confession.[288] On cross-examination, Bearden admitted (1) she had been working as a prostitute before she met the petitioner, (2) her father owned guns and she was familiar with them, (3) she never went to the crime scene the night of the murders, and (4) after initially denying that any promises had been made to secure her testimony, she stated she had been charged with nine felony counts in Colorado, including first degree kidnapping, multiple assault counts, aggravated robbery, aggravated motor vehicle theft, and participating in multiple criminal conspiracies, but allowed to enter into a plea bargain that provided she would plead guilty only to a single count of second degree kidnapping, receive a ten-to-twelve year

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[288] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden at pp. 284-89 and 340-41.

sentence, and then go free after serving only three years if she testified against the petitioner.[289]

After the jury was excused, petitioner's trial counsel interrogated Bearden regarding the details of her criminal conduct in Colorado, eliciting information that established (1) Bearden and Franklin lied to an elderly couple to gain entrance to their home and then tied up and robbed the elderly couple at gun point and (2) the following day, she and Franklin robbed at gun point a man they met at a bar, during which robbery Bearden struck the victim in the head with her gun in an unsuccessful attempt to render him unconscious, threatened to kill him, fired a shot, and fled with Franklin in the victim's car.[290]

Petitioner fails to offer any rational support for his assertion that the foregoing information showed that Bearden and Franklin's crimes in Colorado were in any manner similar to the murders of Powers and Ebbert. The two women's first robbery in Colorado was basically an armed burglary of an elderly couple during which neither of the victims were murdered. Their second robbery was of a man they picked up at a bar and, again, did not murder. This Court fails to find any rational connection, other than the fact a firearm was employed in those two robberies and in the murders of Powers and Ebbert, between the robberies carried out in Colorado by Bearden and Franklin and petitioner's murders of Ebbert and Powers. There was no common modus operandi in any of the three crimes, the victims were very dissimilar in each case, and the circumstances of each crime were totally different from one another. Most significantly, there was no

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[289] Id. at pp. 303-22.

[290] Id. at pp. 322-29.

suggestion that Bearden and Franklin ever shot any of their robbery victims in the face or chest at point blank range as petitioner repeatedly confessed he did to Ebbert and Powers. Any arguable similarities between the robberies Bearden and Franklin committed in Colorado and the robberies of Powers and Ebbert were not only insignificant but irrelevant to the issue of whether the petitioner murdered Ebbert.

Petitioner's new assertion that Bearden was the one who murdered Ebbert is completely without evidentiary support either in the trial record, the record from petitioner's state habeas corpus proceeding, or even in the evidence petitioner purportedly wished to present at petitioner's trial. In fact, there was no evidence introduced at petitioner's trial showing Bearden had any involvement in the murders of either Powers or Ebbert. On the contrary, Seiver testified petitioner told him initially that Franklin had shot the two guards.[291] During her cross-examination, Franklin admitted (1) she had made an arrangement with prosecutors to secure her release from prison in Colorado in exchange for her testimony against petitioner and (2) she had threatened one of her victims in Colorado and told that victim she had killed before.[292] Bearden made no confession that she had ever shot any one or had ever bragged about killing any one. Bearden testified that she did not even learn of the murders of Powers and Ebbert until she saw a television news report about same,

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[291] See S.F. Trial, Volume 4, testimony of Mark Stanley Seiver at p. 371. Neither Seiver nor any other witness at petitioner's trial testified petitioner had ever pointed the finger at Bearden.

[292] See S.F. Trial, Volume 5, testimony of Victoria Ann Franklin at pp. 194-95.

and when petitioner first confessed to her he had committed those murders, she did not believe him until he displayed the money he obtained in the robbery and Franklin corroborated his story.[293] Petitioner offered no evidence at either trial or his state habeas corpus hearing controverting Bearden's trial testimony on these matters. Likewise, despite the passage of many years since his 1981 conviction, petitioner offered no evidence at his state habeas hearing suggesting that anyone other than he murdered Ebbert.

(2) Confrontation Clause Claim

(a) The Constitutional Standard

The Confrontation Clause of the Sixth Amendment guarantees the right of the accused in a criminal prosecution to be confronted with the witnesses against him.[294] The primary purpose of confrontation is to secure the right of cross-examination.[295] Cross-examination is the principal means by which the credibility of a witness and the truth of his testimony are tested.[296] Exposing the witness' motivation in testifying is an important function of cross-examination.[297]

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[293] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden at pp. 279-80, 284-89, and 293-94.

[294] **Delaware v. Van Arsdall**, 475 U.S. 673, 678 (1986); **Davis v. Alaska**, 415 U.S. 308, 315 (1974).

[295] **Id.**

[296] **Davis v. Alaska**, 415 U.S. at 316.

[297] **Delaware v. Van Arsdall**, 475 U.S. at 678-79; **Davis v. Alaska**, 415 U.S. at 316-17.

Effective cross-examination can include not only delving into the witness's perceptions and memory, but also attempting to impeach or discredit the witness through evidence the witness (1) has a prior criminal conviction,[298] (2) made a prior statement inconsistent with his trial testimony,[299] (3) did not testify at trial from his own personal knowledge,[300] or (4) was biased, prejudiced, or otherwise had an ulterior motive for testifying as he did at trial.[301]

Nonetheless, trial judges retain wide discretion to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant to the issues before the jury.[302] The Confrontation Clause guarantees an opportunity for effective cross-examination but not necessarily cross-examination that is effective in whatever way and to whatever extent the defense might wish.[303]

A criminal defendant states a violation of the Confrontation Clause by showing he was prohibited from

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[298] See **Davis v. Alaska**, 415 U.S. at 316.

[299] See **Johnson v. Puckett**, 176 F.3d at 820.

[300] **Id.**

[301] See **Davis v. Alaska**, 415 U.S. at 316.

[302] See **Delaware v. Van Arsdall**, 475 U.S. at 679; **Johnson v. Puckett**, 176 F.3d at 820.

[303] **Delaware v. Van Arsdall**, 475 U.S. at 679; **Delaware v. Fensterer**, 474 U.S. 15, 20 (1985).

engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and, thereby, to expose to the jury the facts from which the jury could appropriately draw inferences relating to the reliability of the witness.[304] Put more simply, the question is whether the jury was given adequate information to appraise the bias and motives of the witness.[305]

(b) Synthesis

At petitioner's 1981 trial, Bearden admitted during cross-examination (1) she had no personal knowledge of petitioner's offense and knew only what petitioner and Franklin had told her about same, (2) she had been charged with not less than nine felony offenses in Colorado, including aggravated kidnapping, multiple assaults, aggravated robbery, aggravated motor vehicle theft, and multiple criminal conspiracies, (3) she had been permitted to enter into an extremely favorable plea bargain under which she pleaded guilty only to a single count of second degree kidnapping and received a two-to-twelve year sentence, and (4) her sentence was to be reduced even further, to only three years, and she was to go free in exchange for her testimony against the

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[304] **Delaware v. Van Arsdall**, 475 U.S. at 680; **Davis v. Alaska**, 415 U.S. at 318; **United States v. Mizell**, 88 F.3d 288, 293 (5th Cir.), **cert. denied**, 519 U.S. 1046 (1996).

[305] See **Johnson v. Puckett**, 176 F.3d at 820; **United States v. Mizell**, 88 F.3d at 293; **United States v. Cooks**, 52 F.3d 101, 104 (5th Cir. 1995) (holding that the constitutional right is not violated if the jury has sufficient information to appraise the bias and motives of the witness).

petitioner.[306] In addition, Bearden admitted she had engaged in acts of prostitution both before and after she met petitioner and both before and after the murders of Ebbert and Powers.[307]

Having carefully reviewed the entirety of Bearden's testimony, this Court concludes the trial court's refusal to permit defense counsel to explore the details of Bearden's criminal activities in Colorado did not deprive petitioner of the opportunity to expose the jury to all of the rational grounds for bias, as well as motives, Bearden possessed for testifying against the petitioner at his 1981 trial. The details of Bearden's extremely favorable plea bargain and the other benefits she was to receive in exchange for her testimony against petitioner were fleshed out in great detail. The fact she had no personal knowledge of the murder of Ebbert was likewise made clear to the jury. Because Bearden did not deny committing any of the offenses with which she was charged in Colorado, there was no additional impeachment value to be obtained by exploring the details of those offenses. No reasonable juror would have learned any thing of value in terms of Bearden's credibility from listening to her recount the details of her Colorado crimes. In short, petitioner's 1981 jury had more than sufficient information to appraise Bearden's bias and motives. The trial court did not violate petitioner's Confrontation Clause rights by precluding

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[306] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden at pp. 255, 279-80, 284-89, 306, 310-19, and 340-41.

[307] **Id.** at pp. 259, 261, 264, 298, and 306.

further cross-examination of Bearden with regard to the details of her Colorado offenses.[308]

Likewise, because none of the witnesses whom petitioner sought to subpoena from Colorado had any personal knowledge regarding petitioner's murder of Ebbert, the trial court's refusal to authorize subpoenas to bring the victims of Bearden and Franklin's Colorado crimes to Texas did not violate petitioner's Confrontation Clause rights. Petitioner does not allege that any of those witnesses could have furnished testimony that would have further impeached Bearden. Moreover, there is no authority for the proposition that a defendant's Confrontation Clause rights extend to allowing the opportunity to impeach a prosecution witness through the testimony of a witness favorable to the defense.[309]

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[308] The Supreme Court's holding in **Davis v. Alaska**, is not nearly as broad as petitioner argues in his pleadings in this Court. **Davis** involved a state trial court's refusal to permit defense counsel to explore on cross-examination the fact that a prosecution witness was on probation and possibly feared revocation of same unless he testified favorably to the prosecution at Davis's trial. In contrast, petitioner's trial counsel was permitted to explore in the jury's presence both the numerous offenses with which Bearden had been charged in Colorado and the details of her extremely favorable plea bargain, including the fact she would go free almost as soon as she returned to Colorado after testifying against the petitioner.

[309] See **Johnson v. Puckett**, 176 F.3d at 821 (citing **Davis v. Alaska**, 415 U.S. at 315-16); **United States v. Kindig**, 854 F.2d 703, 709 (5th Cir. 1988).

(3) Compulsory Process Claim

(a) The Constitutional Standard

The Sixth Amendment provides in relevant part that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.[310] At a minimum, criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before the jury evidence that might influence the determination of guilt.[311] However, the Sixth Amendment does not by its terms grant a criminal defendant the right to secure the attendance and testimony of any and all witnesses; it guarantees only compulsory process for obtaining witnesses in his favor.[312] To establish a violation of the Sixth Amendment right to compulsory process or the Fifth Amendment right to due process, a criminal defendant must make a plausible showing that the testimony of the witness would have been material

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[310] **United States v. Soape**, 169 F. 3d 257, 268 (5th Cir.), **cert. denied**, 119 S. Ct. 2353 (1999).

[311] **Taylor v. Illinois**, 484 U.S. 400, 408 (1988); **Ritchie v. Pennsylvania**, 480 U.S. 39, 56 (1987); **United States v. Soape**, 169 F.3d at 268.

[312] See **United States v. Valenzuela-Bernal**, 458 U.S. 858, 867 (1982); **United States v. Soape**, 169 F.3d at 268; **United States v. Gonzales**, 79 F.3d 413, 424 (5th Cir.), **cert. denied sub nom. Muniz v. United States**, 519 U.S. 869 (1996).

and favorable to his defense in ways not merely cumulative to the testimony of available witnesses.[313]

(b) Synthesis

Insofar as petitioner complains the trial court's refusal to authorize subpoenas directed toward the victims of Bearden's crimes in Colorado violated petitioner's constitutional right to compulsory process, that claim fails for the simple reason that petitioner has alleged no facts showing any of the Colorado witnesses ever possessed any information regarding the petitioner's offense in San Antonio or relevant to the issue of Bearden's credibility. Petitioner does not allege any of the Colorado witnesses could have testified that either Bearden or Franklin ever confessed to the murder of Ebbert or Powers. Petitioner does not allege any of the Colorado witnesses could have testified either Bearden or Franklin ever made any statement regarding the murders of Ebbert or

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[313] See **United States v. Valenzuela-Bernal**, 458 U.S. at 867-68 (applying the same materiality standard as in Brady claims and holding that the omitted testimony must be evaluated in the context of the entire record); **United States v. Romero-Cruz**, 201 F.3d 374, 377 (5th Cir. 2000); **United States v. Soape**, 169 F.3d at 268 (holding the duty is on the requesting party to demonstrate the necessity for the witness's testimony); **United States v. Gonzales**, 79 F.3d at 424 (holding the party requesting a subpoena has a duty to demonstrate the necessity of the witness's testimony); **United States v. Wallace**, 32 F.3d 921, 929 (5th Cir. 1994) (holding that the right to compulsory process does not entitle the defendant to subpoena witnesses whose testimony would be collateral, rather than material, to the issues in the case).

Powers in their presence. Petitioner does not allege any of the Colorado witnesses could have furnished testimony would have impeached any of the trial testimony of Bearden or Franklin. In fact, petitioner failed to present any evidence at the evidentiary hearing held in state court regarding what testimony, if any, the Colorado witnesses could have furnished at petitioner's 1981 trial. Petitioner's reliance on the Supreme Court's opinions in **Washington v. Texas**[314] and **Chambers v. Mississippi**[315] is misplaced. Neither of the fact situations involved in those two cases have any bearing on petitioner's case.

b. Harmless Error

Confrontation Clause claims are subject to the harmless error analysis.[316] Any error in either limiting the

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[314] U.S. 14 (1967). In **Washington**, the Supreme Court struck down a Texas statute that prohibited a criminal defendant from calling a co-defendant, accomplice, accessory, or principal as a witness at trial. Obviously, the facts of petitioner's case were as far from the situation the Supreme Court confronted in **Washington** as is possible.

[315] 410 U.S. 284 (1973). In **Chambers**, the Supreme Court held a criminal defendant's rights to a fair trial were violated when a state trial court refused to permit the defense to call three witnesses who could have testified that a third person had confessed that he committed the offense with which the defendant was charged but later repudiated that confession. Petitioner does not allege that any of his Colorado witnesses could have offered similar testimony.

[316] **Delaware v. Van Arsdall**, 475 U.S. at 684.

scope of defense counsel's cross-examination of Bearden or in denying petitioner's request to bring Bearden's victims to San Antonio to recount their ordeals at the hands of Bearden and Franklin did not have a substantial and injurious effect on the outcome of either phase of the petitioner's trial. Bearden admitted to her many criminal activities in Colorado, and the details of her favorable plea bargain and additional agreement in exchange for her testimony against petitioner were presented to the jury. None of the witnesses whom petitioner wished to subpoena from Colorado have ever been alleged to have possessed any personal knowledge of any facts relevant to petitioner's guilt or to Bearden's credibility. The evidence of petitioner's guilt was overwhelming even if one totally and completely disregards the testimony of Rhonda Bearden, who learned all of what she knew about petitioner's crime from either petitioner or Franklin. The admission of testimony regarding petitioner's confessions to Franklin and Seiver made Bearden's testimony virtually superfluous.

3. AEDPA Review

For the reasons set forth above, the Texas Court of Criminal Appeals' rejections of petitioner's Confrontation Clause and Compulsory Process claims were the products of neither unreasonable applications of clearly established federal law, as determined by the Supreme Court of the United States, nor unreasonable determinations of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's tenth claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

It was the testimony of his purported common law spouse, Victoria Franklin, and petitioner's purported common

law attorney, Mark Seiver, that established petitioner's guilt beyond a reasonable doubt. The testimony of Rhonda Bearden did little more than furnish hearsay corroboration for the testimony of those two witnesses. The trial court's refusal to permit defense counsel to bring witnesses from Colorado to testify about Bearden's criminal conduct in that jurisdiction, which Bearden never denied, was a reasonable exercise of that court's authority to limit cross-examination on only marginally relevant matters and to insist that a party requesting a subpoena show the potential witness to be subpoenaed could furnish material evidence. In any event, given the overwhelming evidence of petitioner's guilt, any error committed by the state trial court in ruling on these matters was harmless as a matter of federal habeas law.

J. Cumulative Error

1. The Claim

In his final claim for relief herein, petitioner argues the cumulative impact of the purported violations of petitioner's constitutional rights discussed above warrants federal habeas corpus relief.[317]

2. De Novo Review

The problem with petitioner's cumulative error claim is that none of petitioner's first ten claims for relief presents a substantial federal constitutional issue. Several of petitioner's claims for relief are founded on factually inaccurate premises. Many of his claims are only assertions of unfairness in a trial in which the evidence of guilt was overwhelming and in

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[317] See Amended Petition at pp. 114-18; Reply Memorandum at p. 23.

which there was no genuine dispute as to either the deliberate nature of petitioner's crime or petitioner's well-settled track record for violence, both inside and out of prison facilities. There was nothing unfair about petitioner's trial. Likewise, petitioner's federal constitutional rights were not violated by the ensuing delay of nearly two decades, during which time petitioner has been confined in conditions which satisfy constitutional standards.

Federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors so infected the entire trial that the resulting conviction violates due process.[318] The cumulative error doctrine provides relief only when the constitutional errors committed in the state trial court so fatally infected the trial that they violated the trial's fundamental fairness.[319] Insofar as petitioner asserts a "cumulative error" theory as a separate ground for relief, that argument is foreclosed by the Fifth Circuit's opinion in **Derden v. McNeel**[320] and its progeny. In order to satisfy the cumulative error rule in the Fifth Circuit, a federal habeas petitioner must show (1) the state trial court actually committed errors, (2) the errors are not procedurally

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[318] **Nichols v. Scott**, 69 F.3d at 1275 (quoting **Derden v. McNeel**, 978 F.2d 1453, 1454 (5th Cir. 1992), **cert. denied**, 508 U.S. 960 (1993)).

[319] **Spence v. Johnson**, 80 F.3d 989, 1000 (5th Cir.), **cert. denied**, 519 U.S. 1012 (1996).

[320] 978 F.2d 1453 (5th Cir. 1992), **cert. denied**, 508 U.S. 960 (1993).

barred, (3) the errors rise to the level of constitutional deprivations, and (4) the record as a whole reveals that an unfair trial resulted from those errors.[321] As this Court's discussion of the many details of petitioner's trial set forth at length above makes clear, none of the alleged errors by petitioner's state trial court or alleged deficiencies in the performance of petitioner's counsel identified by petitioner rise to the level of a violation of petitioner's constitutional rights and the record of petitioner's trial, as a whole, reveals that proceeding was not unfair in any constitutional sense. In this case, petitioner attempts to rely upon the collective force and effect of the various alleged errors committed by his state trial court in presiding over petitioner's capital murder trial as an independent basis for federal habeas relief. However, a petitioner who attempts to cumulate trial court errors that do not rise to the federal constitutional dimension has presented nothing to cumulate.[322] As the Fifth Circuit once succinctly put it, "[t]wenty times zero equals zero."[323] For the foregoing reasons, petitioner's final ground for relief is without merit.

3. AEDPA Review

For the reasons set forth above, the Texas Court of Criminal Appeals' rejection of petitioner's federal cumulative error claim was the product of neither an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore,

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[321] See **Derden v. McNeel**, 978 F.2d at 1458.

[322] See **Yohey v. Collins**, 985 F.2d 222, 229 (5th Cir. 1993).

[323] **Mullen v. Blackburn**, 808 F.2d at 1147.

petitioner's final claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Because the petitioner's trial was conducted in a fundamentally fair manner and because none of his claims for federal habeas relief independently present even an arguable ground for same, petitioner's attempt to rely upon the cumulative effect of same does not warrant federal habeas relief.

IV. Request for a Federal Evidentiary Hearing

Petitioner's request for an evidentiary hearing in this Court is premised upon the conclusory assertion that the extensive evidentiary hearing held in petitioner's state habeas corpus proceeding was "a sham" because the state trial court merely adopted the proposed findings of fact and conclusions of law submitted by the State. Petitioner has not, however, alleged any specific facts showing he was prevented in any way from developing or presenting any evidence during the course of his state habeas corpus hearing. Moreover, petitioner has not alleged any facts showing he was precluded from challenging any of the state trial court's factual findings or conclusions of law when his state habeas corpus proceeding reached the Texas Court of Criminal Appeals. Thus, petitioner has failed to establish he was denied a full and fair hearing before the state courts. While this Court, out of an abundance of caution, has eschewed the narrow standard of review mandated by the AEDPA in the course of analyzing petitioner's claims herein, the AEDPA still sets the standard for determining when an evidentiary hearing may be had in federal court.

The AEDPA significantly restricts the scope of federal habeas review of state court fact findings[324] and limits the circumstances in which a habeas corpus petitioner can obtain an evidentiary hearing in federal court.[325] Under the AEDPA, a state court's factual findings are entitled to a presumption of correctness which the federal habeas petitioner must rebut by clear and convincing evidence. Petitioner has identified no clear and convincing evidence in the record before this Court sufficient to rebut any of the state court's factual findings. Nor would such evidence be of much value. For, as this Court's discussion above points out, the vast majority of petitioner's claims herein are foreclosed by virtue of well-settled legal principles and not because of the findings of the state habeas court, in addition to this court's de novo review of petitioner's claims. This Court made its own factual findings in the course of rejecting petitioner's claims and

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[324] See **Williams v. Cain**, 125 F.3d at 277(recognizing that under the AEDPA, state court factual findings "shall be presumed correct unless rebutted by 'clear and convincing evidence'"); **Hernandez v. Johnson**, 108 F.3d at 558 & n.4 (holding that under the AEDPA, the proper forum for the making of all factual determinations in habeas cases will shift to the state courts "where it belongs" and recognizing that the AEDPA clearly places the burden on the federal habeas petitioner "to raise and litigate as fully as possible his potential federal claims in state court"); 28 U.S. C. § 2254 (e) (1).

[325] See **Robison v. Johnson**, 151 F.3d at 269; **McDonald v. Johnson**, 139 F.3d 1056, 1059 (5th Cir. 1998); 28 U.S.C. §2254 (e) (2).

finds no basis for allowing petitioner further factual development on any of his claims at this juncture.[326]

Likewise, under the AEDPA, a federal habeas petitioner who has failed to develop the factual basis for a claim in state court is not entitled to an evidentiary hearing unless (1) the claim relies on either a new rule of constitutional law, previously unavailable, made retroactive to cases on collateral review or a factual predicate that could not have previously been discovered through the exercise of due diligence and (2) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact-finder would have found the petitioner guilty of the underlying offense.[327] A petitioner does not fail to develop a factual predicate unless the undeveloped record is a result of his own decision or omission.[328] The rare situations in which a hearing is still necessary under post-AEDPA law include those in which the Texas Court of Criminal Appeals either explicitly or implicitly rejected state trial court factual findings on a critical issue.[329] During petitioner's state habeas corpus

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[326] Simply put, petitioner has failed to allege any additional facts not already in the record which, if proven, would entitle him to federal habeas corpus relief. Therefore, petitioner is not entitled to an evidentiary hearing. See **Clark v. Johnson**, 202 F.3d 760, 765-67 (5th Cir. 2000); **Perillo v. Johnson**, 79 F.3d 441, 444 (5th Cir. 1996).

[327] See 28 U.S.C. § 2254 (e) (2).

[328] **McDonald v. Johnson**, 139 F.3d at 1059.

[329] See **Singleton v. Johnson**, 178 F.3d 381, 385(5th Cir. 1999); **Goodwin v. Johnson**, 132 F.3d 162, 182 (5th Cir. 1997).

hearing, petitioner's counsel promised to present to the state trial court evidence from persons who had personal knowledge of the procedures employed during lethal injections in Texas. For reasons not clear from the record now before this Court, petitioner failed to do so. Petitioner is not entitled to a federal evidentiary hearing for the purpose of developing such evidence at this juncture. As explained above, petitioner has failed to establish he was denied a full and fair opportunity to present such evidence in the course of his state habeas corpus proceeding.

V. Certificate of Appealability

Under the AEDPA, an appeal may not be taken from the denial of a petition for federal habeas corpus relief unless a certificate of appealability is issued.[330] The AEDPA converted the "certificate of probable cause" that was required as a prerequisite to an appeal from the denial of a petition for federal habeas corpus relief into a "certificate of appealability."[331] Under the AEDPA, appellate review of a habeas petition is limited to the issues on which a certificate of appealability ["CoA"] is granted.[332] The CoA requirement

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[330] See **Hicks v. Johnson**, 186 F.3d at 636; **Lamb v. Johnson**, 179 F.3d at 356; **Davis v. Johnson**, 158 F.3d at 809.

[331] See **Hill v. Johnson**, 114 F.3d 78, 80 (5th Cir. 1997) (recognizing that the "substantial showing" requirement for a CoA under the AEDPA is merely a change in nomenclature from the CPC standard); **Muniz v. Johnson**, 114 F.3d 43, 45 (5th Cir. 1997) (holding that the standard for obtaining a CoA is the same as for a CPC).

[332] See **Lackey v. Johnson**, 116 F.3d 149, 151 (5th Cir. 1997) (holding that the scope of appellate review of denial

supersedes the previous requirement for a certificate of probable cause to appeal for federal habeas corpus petitions filed after the effective date of the AEDPA.[333] A CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted alone.[334] A CoA will not be granted unless petitioner makes a substantial showing of the denial of a constitutional right.[335] To make such a showing, petitioner need not show he should prevail on the merits, but rather must demonstrate the issues are debatable among jurists of reason; that a court could

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of habeas petition limited to issue on which CoA granted); **Santee v. Quinlan**, 115 F.3d 355, 357 (5th Cir. 1997) (holding that CoA necessary to appeal denial of habeas petition).

[333] See **Robison v. Johnson**, 151 F.3d at 259 n.2; **Hallmark v. Johnson**, 118 F.3d at 1076.

[334] See **Lackey v. Johnson**, 116 F.3d at 151; **Hill v. Johnson**, 114 F.3d at 80; **Muniz v. Johnson**, 114 F.3d at 45; **Murphy v. Johnson**, 110 F.3d 10, 11 n.1 (5th Cir. 1997); 28 U.S.C. §2253 (c) (3).

[335] See **Barefoot v. Estelle**, 463 U.S. 880, 893 (1983); **Miller v. Johnson**, 200 F.3d at 280; **Hicks v. Johnson**, 186 F.3d at 636; **Lamb v. Johnson**, 179 F.3d at 356; **Sonnier v. Johnson**, 161 F.3d 941, 943 (5th Cir. 1998); **Davis v. Johnson**, 158 F.3d at 809; **Whitehead v. Johnson**, 157 F.3d 384, 386 (5th Cir. 1998); **Robison v. Johnson**, 151 F.3d at 262; **Corwin v. Johnson**, 150 F.3d at 471; **Hallmark v. Johnson**, 118 F.3d at 1076; **Lackey v. Johnson**, 116 F.3d at 151; **Washington v. Johnson**, 90 F.3d 945, 949 (5th Cir. 1996), **cert. denied**, 520 U.S. 1122 (1997).

resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.[336]

For the reasons set forth at length above, this Court concludes that none of the petitioner's claims for relief herein satisfy the standard for a Certificate of Appealability. Even under the less narrow, de novo, standard of review, all of petitioner's claims herein are foreclosed by well-settled legal principles. Moreover, petitioner's first through fifth, seventh, eighth, and eleventh claims are also foreclosed by the nonretroactivity doctrine of **Teague**. Petitioner's first, third, fifth, sixth, ninth, and tenth claims are little more than assertions of harmless error.

Petitioner's initial claim is not merely an assertion of harmless error that is foreclosed by **Teague** but a demand for a jury instruction that would have actually harmed petitioner's chances of obtaining a negative answer to the future dangerousness special issue.[337] Petitioner's Penry claim is premised upon evidence which has never been recognized in this Circuit as warranting instructions required by that Supreme Court holding.[338] Petitioner's purported

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[336] See **Barefoot v. Estelle**, 463 U.S. at 893 n.4; **Miller v. Johnson**, 200 F.3d at 280; **Hicks v. Johnson**, 186 F.3d at 636; **Lamb v. Johnson**, 179 F.3d at 356; **Davis v. Johnson**, 158 F.3d at 809; **Hallmark v. Johnson**, 118 F.3d at 1076; **Washington v. Johnson**, 90 F.3d at 949.

[337] Petitioner's complaints about the absence of a parole instruction were rejected by this Court and the Fifth Circuit in the case of Norman Evans Green. The rule he requests is also barred by **Teague**.

[338] In fact, this Court's independent, de novo, review of the trial record disclosed that there was absolutely no **Penry**

Witherspoon claim is premised upon a misrepresentation of the facts surrounding the exclusion of venire member Noble.[339] Petitioner's complaints about the manner in which lethal injection is carried out in Texas is without evidentiary support and, when carefully examined, amounts to a demand for a written protocol, rather than constitutional procedures.[340] Petitioner's ineffective assistance claims are identical to those that have been uniformly rejected in this Circuit for more than a decade. Petitioner's complaints about the admission of evidence and the prosecutor's jury arguments are without merit. Petitioner's complaint about the delay in his execution he has obtained from state and federal courts is without merit. Petitioner's challenge to the Texas capital sentencing scheme's twelve/ten rule is likewise foreclosed by well-settled case law. Petitioner's complaints about Bearden's

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evidence introduced during petitioner's 1981 trial. This is not surprising since petitioner's trial counsel testified that he made an informed, strategic decision not to introduce such evidence for fear it would hurt petitioner's chances of obtaining a favorable answer on the future dangerousness issue.

[339] Even a cursory review of the voir dire examination of Mr. Noble reveals that the holding in **Witherspoon** is as germane to the petitioner's case as the Supreme Court's holding in **Plessy v. Ferguson.**

[340] Petitioner's "as currently administered" challenge to lethal injections in Texas fails because petitioner failed to introduce any evidence showing precisely how lethal injections were, in fact, "currently administered" in Texas. Petitioner's demand for a written protocol does not present a constitutional issue and is foreclosed by **Teague**.

cross-examination are likewise without merit, as is his cumulative error claim.

Given the limitations on the scope of this Court's review of petitioner's claims imposed by the AEDPA, the propriety of the state courts' rejection of petitioner's claims herein are not arguable among jurists of reason. Moreover, as explained above, even if this Court were to undertake a de novo review of each of petitioner's claims herein, petitioner's claims are neither debatable among jurists of reason, capable of rational resolution in a manner different from that set forth above by this Court, nor deserving of encouragement to proceed further. Therefore, this Court will deny petitioner a CoA to appeal in this cause.[341]

Accordingly, it is hereby **ORDERED** that:

1. All relief requested in petitioner's amended federal habeas corpus petition, filed December 10, 1998,[342] is **DENIED**.

2. Petitioner is **DENIED** a Certificate of Appealability.

3. That portion of this Court's Order, issued August 31, 1998,[343] staying petitioner's execution is

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[341] This denial is, of course, without prejudice to petitioner's right to seek a CoA from the Fifth Circuit in the event petitioner files a timely Notice of Appeal in this cause.

[342] See docket entry no. 15.

[343] See docket entry no. 7.

VACATED and the stay of execution contained therein is **RESCINDED**.

4. The Clerk shall prepare and enter a Judgment in conformity with this Memorandum Opinion and Order.

IT is so ORDERED.

SIGNED this 28th day of March, 2000.

/s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS AT ISSUE

AMENDMENT V TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT VIII TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*

AMENDMENT XIV, SECTION 1 TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

Court of Criminal Appeals of Texas,
En Banc.

Miguel A. RICHARDSON, Appellant,
v.
The STATE of Texas, Appellee.

No. 68934.

June 1, 1994.
Rehearing Denied Sept. 21, 1994.
Certiorari Denied June 26, 1995. See 115 S.Ct. 2617.

Defendant was convicted in the 175th Judicial District Court, Bexar County, Preston H. Dial, Jr., J., of capital murder, and he appealed. The Court of Criminal Appeals, 744 S.W.2d 65, affirmed. On petition for writ of certiorari, the United States Supreme Court, 492 U.S. 914, 109 S.Ct. 3235, vacated and remanded. On remand, the Court of Criminal Appeals again affirmed. On petition for writ of certiorari, the United States Supreme Court, 113 S.Ct. 3026, again vacated and remanded. On remand, the Court of Criminal Appeals, McCormick, J., held that: (1) evidence of defendant's voluntary service and kindness to others, artistic and poetic talent, and religious devotion, did not require separate special jury charge during punishment phase, and (2) allegedly mitigating evidence of defendant's character and upbringing did not require separate special jury charge.

Judgment affirmed.

Maloney, J., concurred in the result.

Clinton, J., filed a dissenting opinion.

West Headnotes

[1] **Homicide** 311
203k311

Evidence of defendant's voluntary service and kindness to others, artistic and poetic talent, and religious devotion, could have been used by jury in answering special issue in capital murder trial and, thus, such allegedly mitigating evidence did not require separate special jury charge during punishment phase.

[2] Sentencing and Punishment 1780(3)
350Hk1780(3)
(Formerly 203k311)

Allegedly mitigating evidence of defendant's character and strict upbringing did not require separate special jury charge during punishment phase of capital murder trial, absent showing that commission of murder and other crimes was in any way attributable to allegedly mitigating factors, and absent long-held societal belief that such factors could reduce culpability.

***941** Allen Cazier, San Antonio, Steven B. Rosenfeld, New York City (Maria H. Bainor, of counsel), for appellant.

Fred G. Rodriguez, Dist. Atty., and Keith Burris, Steve Hilbig, James L. Bruner and Daniel Thornberry, Asst. Dist. Attys., San Antonio, Robert Huttash, State's Atty., Austin, for State.

Before the court en banc.

OPINION ON SECOND REMAND
FROM THE UNITED STATES SUPREME COURT

McCORMICK, Presiding Judge.

This case is here on second remand from the United States Supreme Court for us again to consider appellant's *Penry* [FN1] claim in light of *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). We affirmed appellant's conviction on the first remand and held the trial court did not err in failing to submit appellant's requested *Penry* charge at the punishment phase of his trial. *Richardson v. State*, 886 S.W.2d 769 (Tex.Cr.App.1991). We again affirm.

FN1. 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

In *Johnson*, the Supreme Court reaffirmed its prior decisions that in the context of a facial challenge, Texas law sufficiently limits the factfinder's discretion in imposing the death penalty so it is not arbitrarily imposed, while Texas law also provides the factfinder sufficient discretion to give effect to a defendant's "relevant mitigating evidence" in making an individualized assessment of whether the death penalty is appropriate. See *Johnson*, 509 U.S. at ---- - ----, ----, 113 S.Ct. at 2666-68, 2672. The Supreme Court also ***942** reaffirmed prior decisional law that the States may constitutionally channel the factfinder's consideration of "relevant mitigating evidence" as long as the States do not place this evidence

completely beyond the factfinder's effective reach. *Johnson*, 509 U.S. at ----, ----, 113 S.Ct. at 2669, 2672.

Johnson held the relevant mitigating evidence of Johnson's youth was not placed beyond the factfinder's effective reach in answering special issue two; therefore, Johnson was not entitled to a *Penry* charge. *Johnson*, 509 U.S. 350, ----, 113 S.Ct. at 2669, 2672. *Johnson* distinguished *Penry* because Penry's relevant mitigating evidence of his severe mental retardation and childhood abuse, which rendered Penry unable to learn from his mistakes, could not have been given any mitigating effect under special issue one, and could only have been given "aggravating" effect under special issue two; therefore, the special issues placed Penry's "relevant mitigating evidence" completely beyond the factfinder's effective reach. See *Johnson*, 509 U.S. at ---- - ----, 113 S.Ct. at 2667-69; *Penry*, 492 U.S. at 322-24, 109 S.Ct. at 2948-49. *Penry* says a defendant presents "relevant mitigating evidence" when he presents evidence that his criminal acts "are attributable to a disadvantaged background, or to emotional and mental problems."

"If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Penry*, 492 U.S. at 319, 109 S.Ct. at 2947.

[1] Here, in support of his claim that he was entitled to a *Penry* charge, appellant relies on evidence of his "voluntary service and kindness to others," "artistic and poetic talent," and "religious devotion." *Richardson*, 886 S.W.2d at 772-776. The jury could have used this evidence to answer "no" to special issue two. Therefore, the special issues did not place this evidence beyond the effective reach of the factfinder. See *Johnson*, 509 U.S. at ----, 113 S.Ct. at 2669.

[2] Appellant also claims he presented evidence of "childhood abuse and mental and emotional impairment," which made him, like Penry, "unable to learn from his mistakes." Compare *Johnson*, 509 U.S. at ----, 113 S.Ct. at 2667. We disagree, and after having once again reviewed the relevant portions of the record, we conclude most of the evidence appellant presented "is really nothing more than evidence of a strictly rule-governed upbringing." [FN2] See *Richardson*, 886 S.W.2d at 777 (Benavides, J., concurring). This evidence and the other evidence upon which appellant relies is not "relevant mitigating evidence" under *Penry* because appellant has made no showing that his commission of this crime and other crimes was in any way attributable to these factors. See *Penry*, 492 U.S. at 319, 109 S.Ct. at 2947. We also are unaware of any long-held societal belief that one who commits criminal acts that are attributable to these factors "may be less culpable than defendants who have no such excuse." See *id.* Therefore, appellant was not entitled to a *Penry* charge.

FN2. Appellant also relies on evidence which he claims shows his unwillingness to be touched, his

> need to indulge in constant self- aggrandizement, his dressing in women's clothing, his reading problems, his problems in high school with racial integration of the public schools, his father's strict discipline in the home, and his leaving home and dropping out of school at an early age because of a bad relationship with his father. The evidence of appellant dressing in women's clothes came from witnesses who said he did this to facilitate the commission of his crimes.

The trial court's judgment is affirmed.

MALONEY, J., concurs in the result.

WHITE, J., not participating.

CLINTON, Judge, dissenting.

Twice this cause has been remanded to this Court by the United States Supreme Court. First the Supreme Court remanded the cause with instructions to reconsider it in light of its holding in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). That done, the cause was again taken ***943** to the Supreme Court on petition for certiorari. Now the cause is before us again, remanded for reconsideration in light of *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). In *Johnson* the Supreme Court put the finishing touches on a stunning piece of revisionism, recasting *Penry* to mean something it clearly does not. See *Elliott v. State*, 858 S.W.2d 478, at 492-98 (Tex.Cr.App.1993) (Clinton, J., dissenting). Accordingly, the Court has recently observed that so long as evidence proffered

in mitigation of punishment can be given any mitigating application at all under the special issues contained in former Article 37.071(b), V.A.C.C.P., the Eighth Amendment does not require an additional jury instruction on mitigating evidence, as was required in *Penry. Ex parte Davis*, 866 S.W.2d 234 (Tex.Cr.App.1993). The majority today is correct, then, to inquire whether appellant's proffered evidence may be considered mitigating within the confines of the special issues, for that is surely the reconsideration in light of *Johnson* that the Supreme Court contemplated.

The majority concludes that appellant's evidence of "voluntary service and kindness to others," of his "artistic and poetic talent," and of his "religious devotion" could all be given some mitigating effect under the second special issue. Indeed, the majority had already concluded as much in its opinion following the first remand, at least as to appellant's evidence of service and kindness to others, and of religious devotion. It is puzzling, though, that the majority so readily concludes that the evidence of appellant's artistic and poetic talent is covered by the second special issue, considering that on the first remand the Court expressly eschewed such a rationale in rejecting that portion of appellant's contention. In any event, it is not apparent to me that artistic and poetic talent has any relevance whatsoever, aggravating or mitigating, to the issue of future dangerousness. The majority's conclusion that it does bears some explanation. None is forthcoming.

The majority also concludes that appellant is not entitled to a *Penry* instruction on account of evidence of childhood abuse

and disadvantaged background. I continue to believe, as I did at the time of the first remand, that appellant has presented no evidence of an abused childhood. It does seem to me, however, that he presented at least marginally colorable evidence of a disadvantaged background. That evidence has no mitigating significance within the scope of the statutory special issues. Thus, the holding in *Johnson* is not implicated. The majority today therefore disposes of this claim, not according to *Johnson,* but by rote invocation of its own "homemade 'nexus' requirement[.]" *Elliott v. State,* supra, at 492. That approach is not supported by either *Johnson* or *Penry.* Therefore, as in *Lackey v. State,* 819 S.W.2d 111, at 138 (Tex.Cr.App.1991) (On appellant's motion for rehearing) (Clinton, J., dissenting), *Goss v. State,* 826 S.W.2d 162, at 169 (Tex.Cr.App.1992) (Clinton, J., dissenting), and *Ex parte Bower,* 823 S.W.2d 284, at 291 (Tex.Cr.App.1991) (Clinton, J., dissenting), I respectfully dissent.

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Court of Criminal Appeals of Texas,
En Banc.

Miguel A. RICHARDSON, Appellant,
v.
The STATE of Texas, Appellee.

No. 68934.

June 12, 1991.
Rehearing Denied Sept. 18, 1991.

Defendant was convicted in the 175th Judicial District Court, Bexar County, Preston H. Dial, Jr., J., of capital murder, and he appealed. The Court of Criminal Appeals, affirmed, 744 S.W.2d 65, and defendant petitioned for writ of certiorari. The United States Supreme Court, 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583, vacated and remanded. On remand, the Court of Criminal Appeals, McCormick, P.J., held that evidence at sentencing hearing concerning defendant's kindness to others, artistic and poetic talent, childhood abuse and religious devotion did not require special *Penry* instruction on mitigating evidence.

Affirmed.

Benavides, J., filed opinion concurring in judgment.

Campbell, J., concurred in result.

Clinton, J., filed dissenting opinion in which Maloney, J., joined.

Baird, J., dissented.

West Headnotes

[1] Homicide 311
203k311

[1] Sentencing and Punishment 1784(4)
350Hk1784(4)
(Formerly 203k357(4))

Evidence in sentencing phase of capital murder trial, that defendant was a friend of a witness who suffered from diabetes and was losing her eyesight as a result and had expressed concern over the witness' condition, was not mitigating evidence that was either not relevant to special verdict issues or had relevance to defendant's moral culpability beyond scope of special verdict questions that required special *Penry* instruction; jury had opportunity to give effect to witness' testimony through special issue regarding future dangerousness. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[2] Homicide 311
203k311

[2] Sentencing and Punishment 1784(4)
350Hk1784(4)
(Formerly 203k357(4))

Evidence at sentencing phase of capital murder trial, that defendant's letters, drawings and poetry gave 14-year-old girl a different perspective on life and that defendant was a nonviolent person was not mitigating evidence that was either not relevant to special verdict issues or had relevance to defendant's moral culpability beyond scope of special verdict questions, so as to require special *Penry* instruction; witness' testimony went directly to question of future dangerousness, and jury had opportunity to give mitigating effect to evidence through special issue. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[3] Sentencing and Punishment ⚿1721
350Hk1721

(Formerly 203k357(4))

Evidence at sentencing phase of capital murder trial concerning defendant's artistic and poetic talent had no mitigating value in sense that it was relevant to jury making "reasoned moral response" in voting on special issues and did not have particular relevance to defendant's moral culpability outside special issues. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[4] Homicide ⚿311
203k311

[4] Sentencing and Punishment 1772
350Hk1772
(Formerly 203k357(4))

Evidence at sentencing phase of capital murder trial that defendant's father was a strict disciplinarian was insufficient to establish that defendant came from abused background, so as to require special *Penry* instruction on mitigating evidence. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[5] Sentencing and Punishment 1756
350Hk1756
(Formerly 203k357(4))

Evidence at sentencing phase of capital murder trial that social turmoil stunted defendant's educational development and that defendant's teacher called him names did not have significance to defendant's moral capability beyond special issues or any relevance to first two special issues. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[6] Homicide 311
203k311

[6] Sentencing and Punishment 1769
350Hk1769
(Formerly 203k357(6), 203k357(4))

[6] Sentencing and Punishment 1780(3)
350Hk1780(3)
(Formerly 203k357(6))

Testimony of clinical psychologist at sentencing phase of capital murder trial that hypothetical "personality" based on facts of defendant's case would be likely to commit future acts of violence went directly to question of future dangerousness and did not require special *Penry* instruction on mitigating evidence. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[7] Sentencing and Punishment 1780(3)
350Hk1780(3)
(Formerly 203k357(4), 203k311)

Evidence at sentencing phase of capital murder trial that defendant had difficulty learning to read did not require *Penry* instruction on mitigating evidence. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[8] Homicide 311
203k311

[8] Sentencing and Punishment 1784(4)
350Hk1784(4)
(Formerly 203k357(4))

[8] Sentencing and Punishment 1756
350Hk1756
(Formerly 203k357(6))

[8] Sentencing and Punishment 1780(3)
350Hk1780(3)
(Formerly 203k357(6))

Evidence at sentencing phase of capital murder trial concerning defendant's religious devotion while incarcerated was relevant to special issue of future dangerousness and did not require special *Penry* instruction on mitigating evidence. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

***771** Allen Cazier, San Antonio, Steven B. Rosenfeld, New York City, for appellant.

Fred G. Rodriguez, Former Dist. Atty., Edward F. Shaughnessy, III, Keith Burris, Steve Hilbig, James L. Bruner, Daniel Thornberry, Asst. Dist. Attys., San Antonio, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

McCORMICK, Presiding Judge.

Appellant, Miguel A. Richardson, was convicted of capital murder and the death penalty was assessed. This Court affirmed the conviction holding in part that appellant's contention that the trial court erred in refusing his requested charges on mitigation had no merit. *Richardson v. State*, 744 S.W.2d 65, 85 (Tex.Cr.App.1987).

Appellant challenged our holding in the Supreme Court of the United States. That Court, 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583 summarily granted appellant's petition for writ of certiorari, vacated the judgment of this Court and remanded the case to us to consider appellant's allegations in light of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). We again affirm the conviction. [FN1]

> FN1. We will not review appellant's second point of error. It is outside the scope of the Supreme Court's remand order.

In *Penry*, the United States Supreme Court held that the petitioner's mental retardation and history of child abuse constituted mitigating evidence that either was not relevant to the Texas special verdict issues or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions. *Penry*, 492 U.S. at 323, 109 S.Ct. at 2949. In the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's

mental retardation and abused background by declining to impose the death penalty, the Supreme Court concluded that the jury did not have a vehicle to express its "reasoned moral response" to its sentencing decision. *Penry*, 492 U.S. at 326, 109 S.Ct. at 2951. Justice O'Connor writing for the majority emphasized that:

"[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime.' " (emphasis in original) (citations omitted) *Penry*, 109 S.Ct. at 2951.

Our analysis will also consider *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion) and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). We think it appropriate to give consideration to the time when evidence that has been termed "mitigating" occurred. Justice White, writing for the plurality in *Franklin*, specifically referred to *Skipper* when discussing the relevance of a prison disciplinary record. He wrote:

"Indeed, our discussion in Skipper of the relevancy of such disciplinary record evidence in capital sentencing decisions dealt exclusively with the question of how such evidence reflects on a defendant's likely future behavior.... [S]kipper's

discussion of the proper use of a defendant's prison *772 disciplinary record in a jury's sentencing decision focused precisely on the way in which such evidence is encompassed by the Texas future dangerousness question, and on the Court's previous decision in Jurek." *Franklin*, 487 U.S. at 178, 108 S.Ct. at 2329.

We will now consider whether the appellant is correct in his contention that the evidence he presents is, in fact, *Penry* evidence and whether a special instruction should have been granted so that the jury could have made a "reasoned moral response" in answering our special issues. The case may be that appellant's evidence falls under the ambit of *Penry*, is *Franklin* evidence, or has no mitigating value at all in the context of his capital murder punishment phase.

Appellant has grouped what he wishes us to consider "mitigating evidence" into five categories for our consideration. The categories are:
(1) Voluntary service and kindness to others;
(2) Religious devotion;
(3) Artistic and poetic talent;
(4) Family ties; and
(5) Childhood abuse; mental and emotional impairment.

We will now examine the evidence under each category in light of *Penry* and *Franklin*.

VOLUNTARY SERVICE AND KINDNESS TO OTHERS

[1] Linda Cowart testified that she met the appellant at a Sambo's restaurant in Denver, Colorado. Cowart characterized

their relationship as a "friendship" and that they talked about "people going by, cars going up and down the street." This relationship continued after appellant was incarcerated in Denver. Cowart also testified that she suffered from diabetes and as a result was losing her eyesight. She commented that appellant expressed concern over her medical condition in letters and conversation. The record is not clear on whether appellant's concern for Cowart's vision problems occurred before or after his incarceration. Nevertheless, the character and quality of this testimony is not remotely related to the kind of evidence that prompted a reversal in the *Penry* case. Appellant has attempted to posture the Cowart testimony as indicative of lifelong qualities that somehow entitle him to a *Penry* charge. We do not agree and see Cowart's testimony as nothing more than an appeal for "sympathy or emotion." See *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring). Appellant also fails to point out that Cowart was asked about the disposition of appellant. Cowart testified:

"Q. Have you ever known him to be a violent individual?

"A. No, sir.

"Q. Have you ever observed him to have an uncontrollable temper?

"A. No. Any time I've been around him he's always been kind of a happy go lucky person. I've never seen him down. I've never seen him even slightly perturbed about anything."

Considering Cowart's testimony as a whole and disregarding the patent appeals to sympathy and emotion based on the witness' alleged disability, we hold that the jury had the opportunity to give effect to Cowart's testimony through special issue number two regarding future

dangerousness. See *Franklin*, 487 U.S. at 180, 108 S.Ct. at 2330.

[2] Cynthia Lee took the stand and related that she was a resident of Denver, Colorado who had known appellant for four or five years. Lee met appellant in a lounge after bumping into him. Lee testified that she had never dated appellant but they had gone on outings to the mountains. Appellant focuses on the portion of Lee's testimony that describes appellant's relationship with Karen Cracken. Lee described Cracken, a fourteen year old, as coming from a troubled background and as suffering from mental and physical problems. Lee stated that appellant's phone calls, letters, drawings and poetry gave Cracken a different perspective on life. What the brief for appellant does not point out is that appellant never met Cracken face to face and the relationship that is described took place within the time frame of ***773** appellant's incarceration. We have several thoughts on the value of Lee's testimony.

We consider appellant's focus on the physical and mental condition of "his friend" as nothing more than a transparent attempt to bring "sympathy" evidence under the purview of the Eighth Amendment for purposes of a *Penry* charge.

Even more damaging to appellant's assertion that Lee's testimony entitles him to a *Penry* charge is the testimony from Lee that appellant was a nonviolent person. On direct examination the following exchange occurred:

"Q. What type of personality does Miguel have? "A. Very pleasant and just real jolly. You know, he wants to

know what is going on around him.

"Q. Have you ever observed him to be a violent individual?

"A. Not at all. No.

"Q. Have you ever observed him to be mean or vicious towards other people?

"A. Never."

Lee's testimony, taken as a whole, goes directly to the question of future dangerousness and the jury had the opportunity to give mitigating effect to her testimony through special issue number two. See *Franklin*, 487 U.S. at 180, 108 S.Ct. at 2330.

ARTISTIC AND POETIC TALENT

[3] We next confront the evidence of appellant's artistic and poetic talent and its Eighth Amendment value in the context of *Penry*. The brief for appellant contends that the defense presented evidence of Richardson's "significant worth" to society as an artist and poet. Cynthia Lee, a friend of appellant, literally gushed forth with descriptions of appellant's talents. She stated when describing a picture he had drawn: "It was real intensifying." As to appellant's poetry Lee stated: "You can't pickup (sic) a book and read poetry that is as good as a lot of this. Some are short and some of them are three, four, five pages long. Some of them a lot longer than that. They are gorgeous."

Several other witnesses gave passing assessments of appellant's artistic and poetic ability. Paquita Richardson, appellant's sister, testified that appellant was a poet. Kabelitz,

appellant's boyhood minister, also offered his opinion as to the artistic abilities of the appellant. Kabelitz testified that appellant had artistic ability and on occasion would receive appellant's drawings which were of a religious nature. Cowart, also a friend of appellant, mentioned that she had received small drawings on the outside of envelopes and had read "some poetry" by appellant. Bernard, another minister, also testified that appellant could draw.

We reject appellant's contention that the testimony offered establishes appellant's "significant worth" as an artist or poet. *Penry*, at the least, *appears* to demand evidence demonstrating lifelong dedication to the arts or poetry in order to gain status as Eighth Amendment mitigating evidence. *Penry*, 492 U.S. at 324, 109 S.Ct. at 2950 (discussing severity of petitioner's afflictions). If we accept appellant's contention that this kind of evidence deserves a reversal based on *Penry* then *Penry* itself is nothing more than an automatic reversal rule and brings into question the facial validity of our capital murder sentencing scheme. *Penry* implicitly reaffirmed the facial constitutionality of the Texas death penalty statute. 492 U.S. at 317-318, 109 S.Ct. at 2946-2947 (Supreme Court noting that "the facial validity of the Texas death penalty statute had been upheld in *Jurek* on the basis of assurances that the special issues would be interpreted broadly enough ... [and that] Penry argues that those assurances were not fulfilled *in his particular case* ..." [emphasis in the original]).

Rather than attempt to shoehorn appellant's artistic and poetic abilities into the ambit of the second special issue, we choose to confront this issue directly and hold that the appellant's

ability to draw pictures and write poems in the context of this case has no mitigating value in the sense that it was relevant to the jury making a "reasoned moral response" in voting on the special issues nor do those abilities have any particular relevance to the appellant's moral culpability outside the special issues. In this particular case, we think that appellant's artistic talents ***774** do no more than strike an emotional chord that would cloud the jury's deliberations in reaching a decision. See *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed.2d 415, 429 (1990). See also *California v. Brown*, 479 U.S. at 544, 107 S.Ct. at 841 (O'Connor, J., concurring).

CHILDHOOD ABUSE; MENTAL AND EMOTIONAL IMPAIRMENT

[4] Appellant asserts the testimony of Ms. Richardson, his sister, supports his contention that he came from an abused background. To the contrary, Ms. Richardson, a space shuttle payload specialist with Boeing Aircraft, testified as follows:
"Q. [by appellant's counsel] Let me ask you this. Was your father strict at home?
"A. Yes. He was.
"Q. Was he when Miguel was very young, was your father a very, very strict disciplinarian?
"A. He was strict to us, of course being a child we never liked getting whippings or being told what to do, however, he was understanding, but if he said something he meant it."

We disagree with appellant's characterization of this testimony as indicative of an abused background. Ms. Richardson's testimony does nothing more than indicate

appellant came from a normal background. Not one shred of her testimony mentions abuse, beatings, or other familial situations even remotely analogous to the mistreatment present in *Penry*.

Pastor Norb Kabelitz, a Lutheran minister from Oklahoma City, also testified about the general background and special talents of appellant. Appellant points to selected portions of the record which if taken out of context could lead one to believe that appellant suffered a variety of abuses worthy of a *Penry* charge. Close scrutiny of the record reveals otherwise.

Kabelitz testified as follows:

> "Q. Pastor, let me ask you this. In the earlier days was Miguel a well behaved child?
> "A. As normally well behaved as any of my others. Yes. Part of the youth group, the support group of the church. He played a role an acolyte in the church, communion. Sometimes not wanting to go to church like some kids do, et cetera, but he was there.
> "Q. Was his father a strict disciplinarian?
> "A. Yes.
> "Q. Did you have occasion to visit in the home?
> "A. Yes, often.
> "Q. Okay.
> "A. They meant the best for their children. The family from which Miguel comes is a well put together family, very strong father image. A mother who tried to do the best for their children. Middle class you might call them, hard working. He's at Tinker Air Force Base. The mother

> a homemaker and now working for a National Transportation Company...."

This testimony does not indicate that appellant received anything other than a middle class upbringing. At this point we reject any claim that Kabelitz' testimony brings appellant within the scope of *Penry* based on childhood abuse.

[5] Kabelitz also offered testimony concerning the racial strife that occurred in Oklahoma City in the 1960's and the apparent effect on appellant. Kabelitz implied that the social turmoil of that period stunted the appellant's educational development. He also testified that appellant's teachers "put him down publicly in class, called [him] names and [used] innuendos." Richardson has also pointed to the testimony of Lillie Rex and her references to racial problems in Oklahoma City as supportive of this point. We do not believe that Kabelitz' or Rex' testimony about societal conditions in the 1960's and the name calling allegations have any significance to the appellant's moral culpability beyond the special issues or any relevance to the first two special issues. *Franklin*, 487 U.S. at 180, 108 S.Ct. at 2330.

***775** Appellant has also attempted to establish a connection between his alleged abusive background and purported mental and emotional impairment as an adult. Appellant's multiple references to the record regarding Bearden, Seiver, Franklin, Laursen, Dunow, and the State's closing argument fail to establish any connection between alleged childhood abuse and its subsequent effect on appellant. There is simply no *Penry* evidence presented by the appellant's nexus argument.

This Court will not engage in analysis of a theory that is illogical on its face and not supported by the record.

[6] Appellant has also attempted to characterize the testimony of Robert Rast, a clinical psychologist, as indicative of Richardson's mental illness that had its roots in his childhood. Rast, however, was presented with a hypothetical based on the facts of the instant case and asked his opinion as to future dangerousness. Rast testified that in his opinion on direct and cross examination that the hypothetical "personality" in this case would be likely to commit future acts of violence. In closing argument on punishment, defense counsel again emphasized Rast's testimony for its potential value in the jury's deciding the question of future dangerousness. Counsel stated:

> "All right. You had an opportunity to hear and listen to a 'mental health professional' this morning, Doctor Rast. I assume that's what you will base your verdict on as to probability of future conduct."

Defense counsel's cross examination of Rast never established any connection between the diagnosis of sociopath and childhood experiences of Richardson. Rast's testimony went directly to the question of future dangerousness that could be properly considered under special issue number two.

[7] Appellant also asserts that Kabelitz' testimony of appellant's reading problems puts him on equal footing with *Penry*. We reject appellant's argument. Difficulty with learning to read, in and of itself, cannot establish a *Penry* claim. Penry was diagnosed as mentally retarded, in and out

of state schools, and never finished the first grade. *Penry*, 492 U.S. at 307, 109 S.Ct. at 2941. Appellant, on the other hand, did not suffer from the plethora of problems that *Penry* did. Difficulty with reading in the context of appellant's case does not reach the threshold that mandates a *Penry* instruction.

RELIGIOUS DEVOTION

[8] Several ministers other than Kabelitz testified as to the religious devotion of appellant. Doctor Griswold, a lay minister, had occasion to visit appellant during his incarceration in Denver. Griswold testified that appellant "came to a deep understanding of what the christian life is about."

Herbert Holston, minister and educator, also testified that appellant had made attempts to bring other persons to Christ. The record reflects that appellant's evangelical zeal took place while incarcerated in San Antonio.

Wayne Bernard, minister of the Randolph Church of Christ in Universal City, testified that appellant had studied the word of God for seven months. Bernard noted that he had seen a "real conversion within Miguel, and I think that is evidenced by the fact that I have never seen any acts of violence, verbal or physical from him in the seven months I have known him." Again, appellant's conversion took place during his incarceration in San Antonio.

Ralph Vickery, a deputy sheriff, testified that Richardson had a cross forcibly removed from around his neck. Appellant argues the forced removal is evidence of religious devotion;

however, Vickery testified the cross was removed because of a general rule against allowing prisoners to wear necklaces in certain jail areas. Appellant has also offered the testimony of Lillie Rex his childhood Sunday School teacher. Rex stated that Richardson was faithful about coming to Sunday school.

The evidence of appellant's religious devotion is *Franklin* evidence and could be properly addressed by a jury answering issue number two. Appellant's jail house conversions demonstrate nothing more than his ability to adapt to a structured prison environment. We also note that the childhood minister of appellant, Pastor Kabelitz, did not testify about any significant religious devotion, ***776** of the character and quality, that would entitle appellant to a *Penry* instruction. The jury had ample opportunity to give effect to any mitigating value of appellant's religious zeal when they deliberated on the issue of future dangerousness. See *Franklin*, 487 U.S. at 180, 108 S.Ct. at 2329-30.

The judgment is affirmed.

CAMPBELL, J., concurs in the result.

BAIRD, J., dissents.

WHITE, J., not participating.

BENAVIDES, Judge, concurring.

I am unable to join the Court's opinion, but concur in its judgment. This case comes to us on remand from the United States Supreme Court so that we might reconsider our earlier

disposition of it in light of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Accordingly, we once again decide whether, under the Eighth Amendment, appellant was entitled to have his jury determine the mitigating significance, beyond that contemplated by the special punishment issues, of certain evidence proffered by him as a reason for imposition of a sentence less than death. This evidence was of several different kinds, and has been grouped for purposes of analysis into the following categories: (1) voluntary service and kindness to others; (2) religious devotion; (3) artistic and poetic talent; (4) family ties; and (5) childhood abuse, together with mental and emotional impairment.

As I perceive it, the central basis for the Supreme Court's opinion in *Penry* was that mitigating circumstances relevant to punishment within the meaning of the Eighth Amendment are those circumstances of "the defendant's background and character [which will support a] belief, long held by this society, that defendants who commit criminal acts that are attributable to [such circumstances] may be less culpable than defendants who have no such excuse." 492 U.S. at 319, 109 S.Ct. at 2947, 106 L.Ed.2d at 278, quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (concurring opinion of O'Connor, J.). In my view, none of the evidence in the first four categories suggested by appellant meets this criterion, for it seems reasonably clear to me that persons with a history of selflessness or community service, religious or family allegiance, and artistic, scientific or literary talent, are not thought less blameworthy for their criminal conduct by any significant segment of our society.

See Lewis v. State, 815 S.W.2d 560 (Tex.Cr.App.1991). Rather, if society does regard such characteristics as mitigating, it must necessarily be because persons possessing them are thought to be more valuable than are those who do not, or somehow deserving of greater consideration on account of their important contributions. Whatever other social or political interest such a belief may serve, personal moral culpability plainly has nothing to do with this sense of mitigation.

Of course, it might be noticed that "dangerousness" is also irrelevant to culpability, even though a low probability of it has been held to have significant mitigating effect as a matter of constitutional law. *See* Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Restricting one's understanding of "mitigation" only to that evidence which affects culpability would, therefore, draw the constitutional net too tightly. But, to the extent that evidence has a tendency to prove an accused less dangerous than other offenders, the jury is given full authority under Texas statutory law to express its judgment by answering the second special punishment issue negatively. *See* Art. 37.071(b)(2), V.A.C.C.P.

Unquestionably, further careful reading of constitutional precedent in this context also seems to imply that "culpability" and "dangerousness" are not the only mitigation criteria required by the Eighth Amendment. *See* Franklin v. Lynaugh, 487 U.S. 164, 186, 108 S.Ct. 2320, 2332-2333, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring). Certainly, I have no reason to suppose that the Supreme Court has come

to the end of its mitigation exegesis. But neither have I any clear picture of the direction that exegesis is likely to take in the future. In my judgment, the Supreme Court has not yet provided a constitutional theory of mitigation sufficiently general in scope to enable application of it to ***777** evidence which does not bear specifically on issues of culpability or dangerousness. Accordingly, it seems prudent under circumstances as they presently exist for this Court fully to effectuate the doctrine's current scope without extending it to regions as yet unexplored by the Constitution's highest court.

I do not mean by this that only evidence identical to that raised by Penry himself is within the ambit of existing constitutional law. As pointed out in *Gribble v. State*, 808 S.W.2d 65, 75 (Tex.Cr.App.1990), we accept the fact that, whenever a capital defendant produces evidence of his own character, background, or the circumstances surrounding his offense which, according to contemporary social standards, has a tendency to reduce his moral culpability in a way not exclusively related to the deliberateness of his criminal conduct, the provocative behavior of his victim, or the probability of his future dangerousness, the United States Constitution forbids imposition of the death penalty upon him by a sentencer given no means to prescribe, based on such mitigating evidence, a less severe punishment.

Clearly, mental retardation and childhood abuse are not the only circumstances which meet this test. But the test itself is the only one I would apply in Texas until further constitutional interpretation makes its modification necessary.

For this reason, the last category of evidence suggested by appellant seems to me the only plausible candidate for a claim that his personal moral culpability was at issue in a way not contemplated by the statutory punishment questions. When a child has been abused by his parents or by some other person in a position of trust or obligation toward him, he may have a greater tendency than normally reared children to develop an impaired conscience. In my experience, society does have an inclination to regard such persons as less blameworthy when, as adults, they offend social norms and standards. It also seems that society is willing to take this position irrespective of the probability that such offenders will continue, for the same reasons, deliberately to commit criminal acts of violence in the future.

Had appellant produced sufficient evidence to raise the issue that his conscience was impaired because he was abused or betrayed as a child, and might therefore be somewhat less culpable for his criminal behavior as an adult, I would be inclined to hold that he could not be put to death consistently with prohibitions of the Eighth Amendment absent a jury instruction of the kind requested, or its functional equivalent. But, in spite of his protestations on appeal, appellant produced no such evidence at trial. I discern in the appellate record no implication that he was treated in any manner that could fairly be characterized as cruel, deceitful, or contemptuous. Instead, what he identifies in his brief as proof of abuse is really nothing more than evidence of a strictly rule-governed upbringing. Because I am unaware of any conspicuous belief among the American people that such an upbringing mitigates moral responsibility for mature misconduct, I cannot conclude

that appellant's death sentence is offensive to the Eighth Amendment within the meaning of *Penry v. Lynaugh.*

I, therefore, concur in the judgment of the Court.

CLINTON, Judge, dissenting.

The majority opinion demonstrates two fundamental misunderstandings of the very case that prompted the Supreme Court of the United States summarily to remand this cause for our reconsideration, *viz:* *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Because of its crabbed interpretation of *Penry,* the majority has yet to satisfy this mandate.

First, I fear the majority has not assimilated the basic holding in *Penry* that a capital jury must be empowered to effectuate any evidence that has mitigating potential that cannot be *fully* accommodated within the jury's response to special issues under Article 37.071(b), V.A.C.C.P. Early on the majority describes the Supreme Court's holding to be that proof of mental retardation and child abuse "constituted mitigating evidence that either was not relevant to the Texas special verdict issues or that had relevance to ***778** the defendant's moral culpability beyond the scope of the special verdict questions." At 774. So far, so good. However, in coming to address the question whether the evidence proffered in mitigation in this cause necessitated the giving of one or more of his requested instructions, the majority tacitly assumes throughout that as long as it can identify some sense in which that evidence might be said to militate in favor of a "no" answer to one of the special issues, then it is not confronted

with what it calls "*Penry* evidence." This assumption misses the very essence of the Supreme Court's holding. It may well be that the jury "had the opportunity to give effect" to a particular item of mitigating evidence within the parameters of special issues. E.g., at 775, 776 & 778. [FN1] But should that evidence also have some potentially mitigating aspect not accountable under the special issues, we cannot say that special issues enable the jury to give it *full* consideration and effect. The jury must be empowered to give mitigating evidence all the effect to which it is susceptible before we can say the Eighth Amendment has been satisfied, consonant with the holding in *Penry*. [FN2] To the extent it suggests otherwise, the majority opinion errs.

FN1. Telling in this context is the treatment of appellant's claim that evidence of his "artistic and poetic abilities" entitled him to the requested instruction. "Rather than to attempt to shoehorn" these "into the ambit of the second special issue," the majority simply announces these qualities of character have no mitigating significance whatsoever, either within the scope of special issues or otherwise. Slip. op. at 6. Again, this approach tacitly assumes that had the majority been able thus to "shoehorn" the proffered evidence, the analysis would end. The majority apparently continues to subscribe to the view that as long as some mitigating effect can be given within the special issues, the Eighth Amendment is satisfied. Distilled to its essence, this is precisely the view the Supreme Court put to rest in *Penry*.

> FN2. Of course I do not mean to intimate that a jury must assess a penalty less than death in any case in which mitigating evidence going beyond the scope of special issues is presented. But where such evidence is presented jurors must not be precluded from assessing a penalty less than death by omission of a requested instruction that would empower them to do so.

Secondly, as I understand it, the majority categorically rejects the view that evidence of appellant's voluntary service and kindness to others, his artistic and poetic talent, and his religious devotion can have any mitigating potential beyond the scope of special issues. [FN3] By and large, the majority believes such evidence evokes only a "sympathetic" or "emotional" response, not a "reasoned moral response." It is evident to me that a majority of the United States Supreme Court would disagree.

> FN3. I agree with the majority that appellant's evidence he claims establishes a history of family abuse cannot reasonably be construed to do so. On the other hand, evidence that he was "put down" as one of a handful of black students in a predominantly white school, the admittedly nebulous testimony of the effect of the general racial turbulence during his school days, and evidence of a reading disability, all tend, at least, to show "a disadvantaged background," and to show appellant might certainly have cause for "emotional problems." *Penry v. Lynaugh*, 492 U.S. at 318- 319, 109 S.Ct. at 2947, 106 L.Ed.2d at 278, quoting *California v. Brown*, 479 U.S. 538, at 545,

> 107 S.Ct. 837, at 841, 93 L.Ed.2d 934, at 942 (1987) (O'Connor, J., concurring). The majority concludes, *ipse dixit,* that evidence of name-calling and the effect of racial unrest has no bearing on his moral culpability. Similarly, the majority opines that evidence of a reading disability "does not reach the threshold that mandates a *Penry* instruction." Until the majority identifies where that "threshold" lies, however, such pronouncements carry more rhetorical than authoritative weight.

The Supreme Court has told us that "the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." *McCleskey v. Kemp,* 481 U.S. 279, at 304, 107 S.Ct. 1756, at 1773, 95 L.Ed.2d 262, at 286 (1987). [FN4] "[A]ny aspect of a defendant's character or record and any of the circumstances of the offense" that in reason could persuade a jury to impose a penalty less than death may be said in this context to be "relevant" mitigating evidence. [FN5] ***779***Lockett v. Ohio,* 438 U.S. 586, at 604, 98 S.Ct. 2954, at 2965, 57 L.Ed.2d 973, at 990 (1978) (Plurality opinion); *Eddings v. Oklahoma,* 455 U.S. 104, at 110, 102 S.Ct. 869, at 874, 71 L.Ed.2d 1, at 8 (1982).

> FN4. Emphasis here and throughout is in the original.

> FN5. In truth, the concept of "relevancy" in this context seems odd to me. The only material issue, or "fact of consequence," is whether an accused found guilty of a capital crime deserves a sentence less than

> death. As is the case at the punishment phase of a non-capital prosecution, where the issue is simply "what punishment to assess," this is "a normative process, not intrinsically fact bound." *Murphy v. State*, 777 S.W.2d 44, at 63 (Tex.Cr.App.1989) (Plurality opinion on State's motion for rehearing). That being the case, it seems to me that "what is 'relevant' to determining proper punishment is more a question of policy than of logic." *Id.* Because it is a question of Eighth Amendment proportions, however, that policy call is ultimately for the United States Supreme Court to make.
>
> "Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion."

California v. Brown, 479 U.S. 538, at 545, 107 S.Ct. 837, at 841, 93 L.Ed.2d 934, at 942 (1987) (O'Connor, J., concurring). Evidence invoking a purely sympathetic or emotional response is probably not "relevant." See *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

The majority describes evidence of appellant's relationship with Karen Cracken as nothing more than a "transparent" ploy for sympathy. It rejects outright any possibility that evidence of his artistic sensibilities could be a legitimate component of a jury's reasoned moral judgment whether to impose the death

penalty. Nor does the majority itself "believe" his evidence of racial strife during his school years can inform that decision. [FN6] Finally, the majority opines that religious devotion is a consideration that is covered under the second special issue; apparently the majority believes it either has no other mitigating value, or need have no other mitigating value so long as the jury can give it some, albeit not *full,* mitigating effect.

FN6. See n. 3, *ante.*

Evidence precisely of this kind is not squarely covered in *Penry v. Lynaugh,* supra. Nevertheless, it is not plain to me that jurors would find these facets of appellant's character insignificant in making the normative evaluation whether he deserves to live in spite of his crime. The Supreme Court has not expressly limited its view of "relevant" mitigating evidence to those circumstances necessarily bearing on personal culpability for the particular offense committed or those aspects of the defendant's background or makeup to which his crime may be, at least in part, attributable. [FN7] See *Skipper v. South Carolina,* 476 U.S. 1, at 4-5, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1, 7 (1986). To the contrary, there is every indication a majority of the Supreme Court believes "[e]vidence of voluntary service, kindness to others, or of religious devotion" to be relevant inasmuch as it "might demonstrate positive character traits that might mitigate against the death penalty." *Franklin v. Lynaugh,* 487 U.S. 164, at 186, 108 S.Ct. 2320, at 2333, 101 L.Ed.2d 155, at 173 (1988) (O'Connor, J., concurring). When the Supreme Court

defines evidence as "relevant" for Eighth Amendment purposes, this Court is not at liberty to regard it otherwise.

> FN7. Certainly the probability--or, for that matter, the improbability--that a capital defendant would commit future acts of violence that would constitute a continuing threat to society is not a question bearing on his personal culpability for the particular offense on trial. Yet we know that our second special issue provides at least a partial mechanism for jury consideration of what is, in contemplation of the Supreme Court, relevant "mitigating" evidence under the Eighth Amendment. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

Today's majority continues to resist the holdings in *Lockett*, *Eddings*, *Skipper*, and now *Penry v. Lynaugh*, supra, foxhole by foxhole, to the last bunker. See *Stewart v. State*, 686 S.W.2d 118 (Tex.Cr.App.1984) (Clinton, J., dissenting). Declining to join the latest skirmish, I respectfully dissent.

MALONEY, J., joins.

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113 S.Ct. 3026 (Mem)
125 L.Ed.2d 715, 61 USLW 3867
(Cite as: 509 U.S. 917, 113 S.Ct. 3026)

Supreme Court of the United States

Miguel A. RICHARDSON, petitioner,
v.
TEXAS.

No. 91-6745.

June 28, 1993.

Former decision, 492 U.S. 914, 109 S.Ct. 3235.

Case below, 744 S.W.2d 65; 886 S.W.2d 769.

On petition for writ of certiorari to the Court of Criminal Appeals of Texas. The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

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109 S.Ct. 3235 (Mem)
106 L.Ed.2d 583
(Cite as: 492 U.S. 914, 109 S.Ct. 3235)

Supreme Court of the United States

Miguel A. RICHARDSON, petitioner,
v.
TEXAS

No. 87-6482

July 3, 1989

Case below, 744 S.W.2d 65.

On petition for writ of certiorari to the Court of Criminal Appeals of Texas. The ***914** motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

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Court of Criminal Appeals of Texas,
En Banc.

Miguel A. RICHARDSON, Appellant,
v.
The STATE of Texas, Appellee.

No. 68934.

Oct. 28, 1987.

Defendant was convicted in the 175th Judicial District Court, Bexar County, Preston H. Dial, Jr., J., of capital murder and he appealed. The Court of Criminal Appeals held that: (1) trial court's error in sua sponte excluding juror without proper predicate was harmless where State had remaining peremptory challenges; (2) trial court's instructions on capital murder were adequate; (3) defendant was not improperly denied of opportunity to obtain depositions of witnesses in Mexico; (4) defendant was properly precluded from cross-examining witness as to details of prior felony; and (5) defendant did not establish common-law marriage with one witness who testified against him.

Affirmed.

Clinton, J., dissented and filed an opinion in which Teague and Duncan, JJ., joined.

West Headnotes

[1] Criminal Law 1035(6)
110k1035(6)

Defendant's objection to trial court's sua sponte exclusion of juror for cause which called attention to the fact that there was a portion of the statute which the judge appeared to be ignoring in determining that his action was correct was adequate to preserve for appeal claim that court should not have excused the juror without further questioning. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 10.

[2] Jury 133
230k133

Absent questioning of prospective juror as to whether the conclusion he had reached as to defendant's guilt would influence his action in finding a verdict, predicate for excusal had not been laid and it was error for trial judge to excuse juror over defense objection. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 10.

[3] Criminal Law 1166.16
110k1166.16

When trial judge erroneously excuses prospective juror over objection of defense counsel, general rule is that it is not error requiring reversal unless there is a showing that defendant was harmed by the trial court's action.

[4] Criminal Law 1166.16
110k1166.16

In noncapital cases, when State does not use all of its strikes in the jury selection process, harm from erroneous exclusion of juror for cause over defendant's objection is not shown as State could peremptorily strike the juror at the conclusion of voir dire but, in capital cases, it is immaterial that the State had strikes remaining at the end of voir dire because the sustaining of a challenge for cause over defense objection during individual voir dire has the immediate effect of giving the State an additional peremptory strike.

[5] Criminal Law 1166.16
110k1166.16

Existence of unused peremptory strikes at conclusion of jury selection process in capital case rendered improper exclusion of venireman over defendant's objection harmless where the court excused the venireman sua sponte rather than as the result of a challenge for cause by the State.

[6] Criminal Law 1043(3)
110k1043(3)

Defendant who did not object at trial to sua sponte nature of trial court's action in excusing juror, and merely argued that exclusion of the juror was not proper, did not preserve for review contention that it was error to excuse the juror sua sponte.

[7] Witnesses 52(1)
410k52(1)

Where alleged marriage occurred in Oklahoma, claim that there had been a valid marriage, and thus that introduction of witness' testimony violated marital privilege, would be tested according to the substantive laws of Oklahoma.

[8] Witnesses 52(1)
410k52(1)

When considering procedural rules applicable to claim of marital privilege, court would refer to the law of the forum regardless of where the asserted marriage took place.

[9] Marriage 50(1)
253k50(1)

Burden is on proponent of common-law marriage to prove the marriage by clear and convincing evidence in Oklahoma and by preponderance of the evidence in Texas.

[10] Witnesses 78
410k78

Defendant did not show valid marriage to prosecution witness, so as to preclude her testimony against him, in view of fact that defendant claimed that he had represented a number of women as his wife over the years and evidence that he never represented the witness as his wife.

[11] Marriage 13
253k13

Claim of common-law marriage by defendant who seeks to preclude witness' testimony must be closely scrutinized, and agreement of marriage should be specific on both sides.

[12] Witnesses 199(1)
410k199(1)

Attorney-client privilege does not include communications between defendant and fellow inmate who takes it upon himself to give legal advice to defendant.

[13] Criminal Law 629(3.1)
110k629(3.1)
(Formerly 110k629(3), 110k629)

Names of witnesses should be disclosed, upon proper motion by defendant, if they will be used by the State at any stage in the trial.

[14] Criminal Law 1115(1)
110k1115(1)

Standard of review when witness is permitted to testify who was not included on the witness list is whether the trial court abused its discretion in permitting the witness to testify.

[15] Criminal Law 1166(11)
110k1166(11)

Reversal was not required when trial court permitted witness who had not been on State's lists of witnesses to testify at punishment stage where the witness, a psychologist, was not particularly biased towards one side or the other, and defendant did not show in what way the substitution of the witness for other witnesses regarding hypothetical questions concerning defendant's likelihood of committing future acts of violence restricted defendant's ability to cross-examine the witness.

[16] Witnesses 350
410k350

Defendant who was able to fully explore possible prejudices and biases of witness by showing prior offenses was properly precluded from cross-examining the witness concerning the details of the offenses.

[17] Witnesses 344(2)
410k344(2)

Evidence of offenses committed by parties other than the defendant is inadmissible.

[18] Criminal Law 382
110k382

If evidence proffered by defendant is neither inconsistent with nor precludes his guilt, evidence is not proof of any material issue and is properly excluded.

[19] Criminal Law 598(3)
110k598(3)

It was not error to deny defendant's motion for continuance to obtain depositions from witnesses in Mexico where counsel was appointed on March 10 and informed on May 29 that trial was to begin on August 31, and yet made no motion to obtain the depositions until July 29.

[20] Criminal Law 641.12(3)
110k641.12(3)

[20] Witnesses 2(1)
410k2(1)

Defendant was not deprived of effective assistance of counsel and compulsory process by trial court's alleged denial of sufficient time and funds for court reporter and interpreter to go to Mexico City to obtain depositions of witnesses.

[21] Attorney and Client 132
45k132

Counsel is entitled to reimbursement from State for investigative expenses incurred on behalf of indigent

defendant only after they are incurred. Vernon's Ann.Texas C.C.P. art. 26.05.

[22] Homicide 354(1)
203k354(1)
(Formerly 203k354)

Defendant's failure to object to testimony of witness that he had supervised defendant after his release on parole waived any error as to introduction of federal judgment and commitment during punishment phase of capital murder trial.

[23] Homicide 18(5)
203k18(5)

Capital murder based on the intentional commission of murder in the course of committing robbery is committed when a person intentionally and knowingly causes the death of an individual and intentionally commits the murder in the course of committing or attempting to commit robbery. V.T.C.A., Penal Code § 19.03(a)(2).

[24] Criminal Law 772(1)
110k772(1)

[24] Indictment and Information 60
210k60

Indictment must set forth the offense in plain and intelligible words and instruction to the jury generally must correspond to the allegations in the indictment. Vernon's Ann.Texas C.C.P. arts. 21.02, 21.11.

[25] Homicide ⚿138
203k138

Trial court's instructions which followed language of indictment charging defendant with capital murder committed in the course of committing or attempting to commit a robbery clearly indicated that defendant was being charged with capital murder on the basis of committing the robbery and not with felony-murder. V.T.C.A., Penal Code §§ 19.02(a)(3), 19.03(a)(2).

[26] Homicide ⚿289
203k289

Trial court's instruction which properly required that jury find that defendant intentionally caused death while in the course of committing or attempting to commit robbery properly tracked the indictment and did not permit jury to convict defendant upon a finding of a culpable mental state less than that required by statute. V.T.C.A., Penal Code § 19.03(a)(2).

[27] Criminal Law ⚿1169.1(8)
110k1169.1(8)

Admission of items found during allegedly illegal search was cumulative to testimony of other witnesses and thus was harmless beyond a reasonable doubt.

***67** Allen Cazier (Court-appointed), San Antonio, for appellant.

Fred G. Rodriguez, Dist. Atty. & Keith Burris, Steve Hilbig, James L. Bruner & Daniel Thornberry, Asst. Dist. Attys., San Antonio, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

PER CURIAM.

Appellant was convicted of capital murder. The special issues required under Article 37.071(b), V.A.C.C.P., were submitted to the jury and were answered in the affirmative. Punishment was assessed at death. Having reviewed appellant's twelve grounds of error, we affirm. [FN1]

> FN1. We will use the term "ground of error," because it was proper when appellant's appeal was filed and was used by appellant in his brief.

We will first consider appellant's eleventh ground of error, in which he makes his sole complaint regarding voir dire examination. He complains of the improper excusal of prospective juror William Noble. Earlier during the examination of Noble, the trial court overruled the State's challenge for cause on *Witherspoon* grounds. [FN2] Later, however, Noble was excused *sua sponte* by the trial judge after Noble stated that he had already formed an opinion as to guilt or innocence. As stated in appellant's brief: "Defense counsel objected on the basis that Mr. Noble was being excused by the court without the full predicate for his excuse [sic] having been laid. The court replied that when a

prospective juror states that he has already formed an opinion as to the guilt or the innocence of the defendant there should be no further questioning. Defense counsel then pointed out that an additional sentence is contained in the article in question." The entire exchange is herein set out:

> FN2. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

"[NOBLE:] You used a couple of words there, bias and impartial that I think you might want to pursue.
"[DISTRICT ATTORNEY:] Well, are you biased in some manner about this case?
***68** "[NOBLE:] Well, I have read quite a bit about it. And I feel that I have already prejudged the case. I mean I take all the newspapers. I'm a journalist by profession and I know--I don't disregard what I see in the paper.
"THE COURT: Have you already formed an opinion as to the guilt or innocence?
"[NOBLE:] Yes, Your Honor. I think it's only fair that I say that I have formed an opinion.
"THE COURT: You will be excused Mr. Noble. You can return to the Central Jury Room. They will discharge you from there.

* * *

"[APPELLANT'S ATTORNEY:] If the Court please, the Defendant objects to Mr. Noble being excused, the entire predicate not having been laid for his excuse.
"THE COURT: You are excused.

* * *

"THE COURT: The statute provides if the juror states from hearsay or otherwise he has already formed an opinion as to the guilt or innocence of the Defendant there will be no further questioning.
"[APPELLANT'S ATTORNEY:] Does it say one more sentence?
"THE COURT: [Ignoring the last remark of appellant's attorney] Can you do one [another juror] in ten minutes?
"[DISTRICT ATTORNEY:] No sir.
"[APPELLANT'S ATTORNEY:] I would say that we--
"THE COURT: Mr. Williams [District Attorney] says no. I'll accept that. Let's recess until 1:30, gentlemen."
[Lunch Recess Declared]

The statute referred to, Art. 35.16(a)(10), V.A.C.C.P., provides in pertinent part that a challenge for cause may be made for the following reason:
"That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged without further interrogation by either party or the court. If he answers in the negative, he shall be further examined...."

[1][2] Contrary to the State's argument in its brief on appeal, we find the objection of appellant's counsel, although not a model in specificity, was sufficient to preserve his complaint on appeal that an Art. 35.16(a)(10) challenge for cause requires more than that the juror express that he has established a conclusion as to a defendant's guilt or innocence. It is readily apparent that appellant's counsel was attempting to alert the trial judge that Noble needed to be asked whether, in his opinion, the conclusion would influence him in his action in finding a verdict. Absent this question, made mandatory by the statute, the predicate for excusal had not been laid. Indeed, even if the question had been asked and answered, the predicate for excusal would only be complete if the reply were yes. A negative reply calls for further specific questioning about the extent to which the conclusion will affect his action, followed by a discretionary decision by the trial judge concerning the venireman's impartiality.

It is clear then that the predicate for excusal under Art. 35.16(a)(10) had not been laid and that the objection of appellant's attorney specifically directed the trial court's attention to the missing portion of the predicate. The overruling of said objection constituted error. It remains to be seen whether such error requires reversal.

[3][4] When a trial judge erroneously excuses a prospective juror over the objection of defense counsel, the general rule is that this is not error requiring reversal unless there is a showing that appellant was harmed by the trial court's action. Culley v. State, 505 S.W.2d 567 (Tex.Cr.App.1974); *69Henriksen v. State, 500 S.W.2d 491 (Tex.Cr.App.1973);

Weaver v. State, 476 S.W.2d 326 (Tex.Cr.App.1972). In Payton v. State, 572 S.W.2d 677, 680 (Tex.Cr.App.1978), this Court held that "[h]arm may be shown in the erroneous exclusion of a qualified juror by showing the State exhausted its peremptory challenges." If the State has exhausted all of its peremptory challenges, the trial court's action, "from the perspective of the defendant, [was] the same as if the State had been given an extra peremptory challenge." Payton, supra at 680; Martinez v. State, 621 S.W.2d 797 (Tex.Cr.App.1981). When the State does not use all of its strikes in the jury selection process, however, harm is not shown because had the judge refused the challenge for cause the State could have (and most assuredly would have) peremptorily struck the person from the jury at the conclusion of the voir dire. Thus, by reserving an unused peremptory challenge the State is permitted a constructive use against the erroneously excluded venire member. Payton, supra; Culley, supra; Weaver, supra.

In capital cases, however, it is ordinarily immaterial that the State had strikes remaining at the end of the voir dire examination. If the trial court erroneously sustains a State's challenge for cause over defense objection during individual voir dire in a capital case, this has the immediate effect of giving the State an additional peremptory strike. Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981). As stated in Grijalva, supra at 424:

"The manner of exercising peremptory challenges is explicitly differentiated in Arts. 35.13 and 35.25, V.A.C.C.P. The procedure followed in Chambers [v. State, 568 S.W.2d 313 (Tex.Cr.App.1978)] and this case is stated in Art. 35.13,

supra:
'A juror in a capital case in which the state has made it known it will seek the death penalty, held to be qualified, shall be passed for acceptance or challenge first to the state and then to the defendant. Challenges to jurors are either peremptory or for cause.'
"On the other hand, in non-capital cases, such as those upon which *Chambers* relied, the procedure is quite different, as provided in Art. 35.25, supra:
" 'In non-capital cases and in capital cases in which the State's attorney has announced that he will not qualify the jury for, or seek the death penalty, the party desiring to challenge any juror peremptorily shall strike the name of such juror from the list furnished him by the clerk.'"

To allow the State to render harmless the improper challenge for cause and excusal of a venire member by the simple expedient of not using all of the State's peremptory challenges would be, as stated in Grijalva, supra at 424- 425:
"... corruption of the peremptory strike practice that violates the terms of Art. 35.13, supra, and gives an unfair advantage to the State in the jury selection process.
First, to allow the State to exercise its peremptory challenges in a capital case after conclusion of the voir dire examination gives it the benefit of making its judgments with a perspective of the entire panel, a perspective that is not given the defendant.
Second, giving such a privilege to the State allows it to withhold its strikes until after the defendant has exercised his strikes, even though Art. 35.13, supra, explicitly states that the qualified venireman shall be passed first to the state and

then to the defendant. The statute would give the benefit to the defendant in instances where both sides might desire to strike the same venireman. Allowing the State to wait until the end of the selection process would transfer that benefit to the State.

Third, to allow retrospective exercise of peremptory challenges *on appeal* gives the State even greater advantages. When used on appeal the State effectively postpones exercise of its strikes until error has been found, and then with the benefit of the ruling of this Court as its guide the State can maximize the accuracy of the strikes not used at trial. In actuality this Court not only counsels the State, but actually exercises the strike ***70** for the State. In effect a peremptory strike against a prospective juror is transformed into a peremptory strike against a ground of error." (Emphasis in original) [FN3]

> FN3. Although the venire member in Grijalva, supra, was erroneously excluded on Witherspoon, supra, grounds, the rationale of *Grijalva* clearly applies to all challenges for cause in death penalty cases since this Court specifically held that the decision was based on State law grounds and was not limited to *Witherspoon* error. Grijalva, supra at 425.

In Bell v. State, 724 S.W.2d 780 (Tex.Cr.App.1986), we set forth the rules relative to jury selection and its review, and stated, id. at 795:

"Before addressing appellant's specific contention, we will make a brief recitation of the rules regarding jury selection and the harm a defendant must show in order to merit

reversal. If a trial court erroneously overrules a defendant's challenge for cause, the defendant may establish harm by showing: (1) exhaustion of his peremptory challenges; (2) denial of a request for additional peremptory challenges; and (3) the seating of a juror upon whom the defendant would have exercised a peremptory challenge. East v. State, 702 S.W.2d 606 (Tex.Cr.App.1985); White v. State, 629 S.W.2d 701 (Tex.Cr.App.1981), *cert. denied,* 456 U.S. 938, 102 S.Ct. 1995, 72 L.Ed.2d 457 (1982); Hernandez v. State, 563 S.W.2d 947 (Tex.Cr.App.1978); Payton, supra. In non-capital murder cases, if the trial court erroneously grants a State's challenge for cause and excludes a qualified juror, the defendant may establish harm simply by showing that the State exhausted all of its peremptory challenges. In such a case the court has effectively given the State the benefit of an additional peremptory challenge. Payton, supra. See also Culley v. State, 505 S.W.2d 567 (Tex.Cr.App.1974); and Weaver v. State, 476 S.W.2d 326 (Tex.Cr.App.1972). In capital murder cases, if the trial court improperly sustains a State's challenge for cause and excludes a qualified juror, over a defendant's objection, reversible error arises regardless of whether the State has exhausted its peremptory challenges. This is because peremptory strikes are exercised after each prospective juror is questioned, under Art. 35.13, V.A.C.C.P., as opposed to after the entire panel is questioned in a non-capital case. Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981). See also Turner v. State, 635 S.W.2d 734 (Tex.Cr.App.1983)."

We then observed that the rules are different when a trial court excuses a prospective juror *sua sponte:*

"When the trial court *sua sponte* excludes a *qualified* juror, the situation must be distinguished from a similar excusal that is prompted by the State. Grijalva, supra, held that any State's unused peremptory strikes remaining at the end of voir dire would not remove the harm of an erroneous excusal of a qualified juror. This conclusion is based on the notion that otherwise the State would receive three unfair advantages over the defense: (1) hindsight in exercising peremptory strikes that was denied to the defense; (2) the benefit of striking last that is statutorily given to the defense by Art. 35.13, V.A.C.C.P.; and (3) the benefit of having the court strike, on behalf of the State, a venireman on appeal after voir dire error has been pronounced. But *Grijalva* is founded on the notion that the State *caused* the improper excusal by issuing a challenge for cause, and is therefore penalized because of the advantages it would otherwise receive by holding a peremptory strike back. Where the trial judge, not the State, is solely responsible for the improper excusal, the justification for penalizing the State under *Grijalva* disappears. It is entirely appropriate in such a case to fall back on the rationale in Weaver, supra, Payton, supra, and Culley, supra, and assess harm to the defendant on whether the state had remaining peremptory strikes left at the close of the voir dire."

Bell, supra at 795-6.

Thus, just as in the case now before the Court:

***71** "In the case at bar, the State had remaining at the conclusion of jury selection a total of one peremptory strike. Unlike *Grijalva,* however, the venire member in this case was

not excused via challenge for cause by the State. The trial judge excused him *sua sponte*. The State in no way prompted the erroneous excusal nor did it have an opportunity to timely exercise a peremptory challenge against him had it wished to. In short, this venire member was never passed first to the State and then to the appellant for challenges according to the requirements of Art. 35.13, V.A.C.C.P. Thus, the 'corruption of the peremptory strike practice' that gave the State 'an unfair advantage,' so condemned in Grijalva, supra at 424, is absent from this case."

[5] We find that Grijalva, supra, is distinguishable from this case since the trial judge excused the venireman *sua sponte* rather than as the result of a challenge for cause by the State, thus depriving the State of the orderly opportunity to challenge peremptorily. Therefore, we hold that the existence of unused peremptory strikes at the conclusion of the jury selection process renders the improper excusal of the venireman harmless. Culley, supra; Weaver, supra.

[6] In this same ground of error, appellant also appears to complain that the *sua sponte* nature of the trial court's action in excusing Noble was in and of itself sufficient to require reversal. Although the trial court should not have on its own motion excused the venire member on grounds which do not show an absolute disqualification under the authority of Art. 35.19, V.A.C.C.P., appellant's objection at trial did not address the *sua sponte* nature of the trial court's action. Thus, appellant's complaint on appeal does not comport with his objection at trial. This error is not preserved for review. Hernandez v. State, 643 S.W.2d 397 (Tex.Cr.App.1982);

Esquivel v. State, 595 S.W.2d 516 (Tex.Cr.App.1980), *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App.1976), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977). Even if error had been preserved, it was harmless since the State had peremptory strikes left. See discussion, supra. Appellant's eleventh ground of error is overruled.

Although appellant does not challenge the sufficiency of the evidence, a brief recitation of certain relevant facts is assistive in disposing of appellant's remaining grounds of error.

The victim of the offense was a security guard at the Holiday Inn in San Antonio. He and another security guard were dispatched early in the morning of March 31, 1979, to investigate a complaint from a guest in room 494 that someone was trying to break into her room. Room 494 was occupied by three women from Mexico City. Shortly after the front desk clerk had sent the two unarmed security guards to investigate the complaint, the guest in room 494 called again and stated she thought she had heard gunshots. Eventually the front desk clerk found the bodies of the two security guards lying in a first floor stairwell. One victim had his hands handcuffed behind his back and both had been shot at close range with a .38 caliber Arminius Titan Tiger pistol. [FN4] Appellant had acquired a .38 caliber Arminius Titan Tiger pistol several days earlier.

> FN4. A firearms and toolmark examiner for the San Antonio Police Department testified that the make of the pistol used in the offense could be and was

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determined by bullets recovered from the body of the victim.

The evidence also reflected that at the time of the offense appellant and the three young women who were traveling with him occupied the room across the hall from room 494. The three young women, seventeen-year-old Victoria Franklin, sixteen-year-old Rhonda Bearden, and seventeen-year-old Lisa Laursen, were working as prostitutes in the various cities the group visited. All three women testified at the trial. On the evening before the offense, the appellant had mentioned that one of the women from Mexico City was wearing what he considered to be expensive jewelry. According to Franklin's testimony, appellant *72 awakened her on the morning of the offense and told her he had disguised himself and, armed with the .38 caliber pistol, had attempted to gain entry to the room occupied by the women from Mexico City. Before gaining entry, he was interrupted by the two security guards. The guards were escorting appellant down the stairs to the front desk in order to establish his identity when appellant's weapon, which was in his waistband, fell to the floor. He grabbed the gun, handcuffed one of the guards, took their money, shot and killed both of them, and returned to his room. Upon his request, Franklin went to the scene of the murders and wiped the area with a towel to remove any fingerprints. The victims had not yet been discovered and Franklin saw them lying in the stairwell. She then returned to the room and disposed of the bullets and spent shells by flushing them down the toilet.

Appellant and Franklin later told Bearden about the murders. While in Colorado awaiting extradition to Texas, appellant also confessed to Mark Stanley Seiver, another inmate.

In his first ground of error, appellant contends that the trial court erred in finding that Franklin was not the common-law wife of appellant and in permitting her to testify against appellant in violation of the husband-wife privilege embodied in Art. 38.11, V.A.C.C.P. [FN5]

> FN5. Art. 38.11, V.A.C.C.P., provided in pertinent part, at the time of trial:
> "Neither husband nor wife shall, in any case, testify as to communications made by one to the other while married.... The husband and wife may, in all criminal actions, be witnesses for each other, but except as hereinafter provided, they shall in no case testify against each other in a criminal prosecution...."

In response to defense counsel's leading questions during a hearing held outside the presence of the jury, both Franklin and appellant testified that they had entered into a valid common-law marriage shortly after Franklin's seventeenth birthday "on or about the latter part of January into February 1979" while they were living together in Oklahoma. During cross-examination, however, Franklin admitted that appellant never introduced her to anyone as his wife, that she did not tell other people that they were "married" until after her arrest several months later, and that the vows were secret. [FN6] Franklin also testified that a couple of weeks after they exchanged these "secret vows" Rhonda Bearden entered the

picture and appellant was introducing Bearden as his wife. Lisa Laursen also occasionally acted as appellant's wife. It was Laursen who registered as appellant's wife at the Holiday Inn in San Antonio. Franklin also testified that Bearden, not Franklin, shared appellant's bed during their travels.

> FN6. Franklin described the "vows" as follows:
> "Q. Now, what do you mean he made vows to you, what did he tell you?
> "A. That he wanted me to be his wife.
> "Q. What did you tell him about that? "A. I just looked at him and said, 'Well'.
>
> * * *
>
> "Q. Did he tell you anything further at that time?
> "A. Yes. He said he wanted me to be his wife and that to do as he--you know--to share responsibilities and do as, you know, he tells me to.
> "Q. And to do as he told you to do?
> "A. Yes."

Assistant District Attorney Keith Burris testified that he specifically asked Franklin in September of 1979 if she had ever been married to appellant and she "emphatically" denied the same. He testified that she reaffirmed that statement several other times prior to trial.

According to the testimony of Bill Blagg, who was employed as an Assistant District Attorney for Bexar County, he also interviewed Franklin in September of 1979 regarding her relationship to appellant. He testified that Franklin told him

she had never represented herself as appellant's wife, although Bearden had, and that she described her relationship with appellant as a "working relationship, that of a prostitute and a pimp." Blagg further testified Franklin "was given every opportunity to say she was the wife of Silky [appellant] or there was a husband-wife relationship. ***73** She never indicated it nor did I see any evidence of it when I looked for it."

The record further reflects that while the incarcerated appellant was awaiting extradition for the instant offense, he signed two "Applications for Representation by Public Defender" before an Oklahoma judge "under penalty of perjury," wherein he swore he was single. Those applications were executed on April 26, 1979, and June 27, 1980. Appellant's explanations for these two "perjured" statements was that each time there was a woman present (different each time) who he wanted "to catch." He also testified that "[r]umors had it that three or four statements were against me and at the time I didn't want to claim nobody, so I lied. I lied. I sure did."

Appellant's testimony on this issue was full of inconsistencies and self-serving statements. When questioned about how many women he had represented as his wife over the years, his response was "[i]t depends on the circumstances and the situation. * * * Man, I know too many women. I know too many. I can't keep up with names, dates, all that, man." Although appellant testified, contrary to Franklin, that the marriage was not "secret" and that he, at some point, had told relatives and "numerous people" about the marriage, not one

shred of documentary evidence or other testimony was introduced to support that claim. In fact, all the evidence, including the testimony of Franklin, directly contradicted that claim. It could be inferred from the record that appellant's first open claim to the common-law marriage came after the realization that Franklin was going to be, in the words of appellant in his brief, the "State's most effective witness against the defendant."

[7][8][9][10] Since the alleged marriage occurred in Oklahoma, the claim must be tested according to the substantive laws of that state which were introduced at trial by the appellant and considered by the trial judge in making his decision. McArthur v. Hall, 169 S.W.2d 724 (Tex.Civ.App.--Fort Worth 1943). When considering the procedural rules applicable in the instant case, however, we must refer to the laws of the forum. Nevertheless, we note that in both Oklahoma and Texas, the burden is on the proponent of a common-law marriage to prove the same, by clear and convincing evidence in Oklahoma and by the preponderance of the evidence in Texas. Maxfield v. Maxfield, 258 P.2d 915 (Okl.1953); In re Estate of Stinchcomb, 674 P.2d 26 (Okl.1983, on rehearing); Faglie v. Williams, 569 S.W.2d 557 (Tex.Civ.App.--Austin 1978). We find the appellant failed to meet his burden.

[11] A claim of common-law marriage in circumstances such as this must be closely scrutinized by the courts, and the agreement of marriage should be specific on both sides. Hightower v. State, 629 S.W.2d 920 (Tex.Cr.App.1981); Bodde v. State, 568 S.W.2d 344 (Tex.Cr.App.1978), *cert.*

denied, 440 U.S. 968, 99 S.Ct. 1520, 59 L.Ed.2d 784 (1979); Chatman v. State, 513 S.W.2d 854 (Tex.Cr.App.1974); Krzesinski v. State, 169 Tex.Cr.R. 178, 333 S.W.2d 149 (App.1960); Welch v. State, 207 S.W.2d 627 (Tex.Cr.App.1948).

The Oklahoma Supreme Court in Stinchcomb, supra, summarized the requisite elements of a common-law marriage in Oklahoma as follows:
"A party asserting a common law marriage must prove the following elements: an actual and mutual agreement between the spouses to be husband and wife; a permanent relationship; an exclusive relationship, proved by cohabitation as man and wife; and the parties to the marriage must hold themselves out publicly as husband and wife." Id. at 28-29.

The Court earlier held:
"In this jurisdiction it is the well-established rule that a consensual or so-called common-law marriage is a status to which a mutual consent is essential, consent being the threshold by which the status is reached but *which status is not attained until there has been a holding out by the parties of themselves as husband and wife and a public assumption *74 of the relation.*" [FN7] In re Trope's Estate, 190 Okl. 453, 124 P.2d 733, 736 (1942).

> FN7. All emphasis throughout this opinion is supplied by the author unless otherwise noted.

The evidence elicited relative to this issue, as summarized above, clearly reflects that the appellant failed to prove, as a matter of law, all of the elements required by Oklahoma to

establish a common-law marriage. We have serious reservations as to whether the testimony adduced raises even one of the requisite elements.

The appellant's motives for attempting to raise the issue at the time of trial are quite clear. His testimony, however, and that of Franklin, failed to establish that there was an actual and *mutual* agreement; or that his intent was to enter into a *permanent* and *exclusive* relationship, see Marshall v. State, 537 P.2d 423 (Okl.Cr.App.1975); or that the cohabitation of the two was not "irregular, limited or partial," In re Miller's Estate, 182 Okl. 534, 78 P.2d 819 (1938); see also Quinton v. Webb, 207 Okl. 133, 248 P.2d 586 (1952); Richard v. Richard, 172 Okl. 397, 45 P.2d 101 (1935); or, most certainly, that either of them openly held themselves out as husband and wife, see Marshall v. State, 537 P.2d 423 (Okl.Cr.App.1975); Richard, supra.

We can only conclude that there was insufficient evidence to establish that any marriage "had in fact been agreed to, consummated and adhered to" during the short time appellant and Franklin resided under the same roof. In re Phifer's Estate, 629 P.2d 808, 809 (Okl.App.--Div. No. 2 1981). We agree with the Oklahoma Supreme Court's ultimate holding in Miller's Estate, supra at 828, that the appellant's "subsequent actions, heretofore related, were so inconsistent with the idea of a marriage relationship that [his] testimony regarding the same became inherently improbable and was therefore properly disregarded by the court."

Furthermore, in Hightower, supra, we held:

"The existence of a common-law marriage is an issue of fact to be determined by the trier of the fact. Warren v. Kyle, 565 S.W.2d 313 (Tex.Civ.App.-- Austin 1978, no writ). We find that appellant's failure to complain that the issue of a common-law marriage was not submitted to the jury, or to request that it be submitted, waived the error he now seeks to present." *Id.* at 924.

In the instant case, as in *Hightower,* the issue of the common-law marriage was not established as a matter of law and we can find no request from the appellant that the issue be submitted to the jury. No such issue was submitted. The error is waived.

Appellant's first ground of error is overruled.

In his second ground of error appellant contends that the trial court erred in permitting Mark Stanley Seiver to testify against the defendant where Seiver's knowledge of the case came to him "by virtue of his status as the defendant's legal advisor, in violation of the common law attorney-client privilege."

Seiver testified that he met the appellant while both were incarcerated in the Denver County Jail in Colorado. The appellant dismissed the public defender who was representing him and enlisted Seiver's assistance in contesting his extradition to Texas for the instant offense inasmuch as Seiver was fighting his own extradition to California and had assisted other inmates in similar proceedings. Seiver was not and had never been licensed to practice law, he had never attended law school, and he had only a pre-law undergraduate

degree. Seiver testified he told appellant he was studying law in college and appellant knew he did not have "a bar card" and was not licensed to practice law. During the course of his relationship with Seiver, appellant confessed to the instant offense and revealed many details of the murder. Seiver testified that the incriminating statements were not necessary for the preparation of the extradition documents. These incriminating statements were admitted at trial over the appellant's objection that the statements were subject to a common-law attorney-client privilege.

***75** The appellant does not argue that he believed the witness was a licensed attorney and was misled to his detriment. Instead, he contends that Seiver was acting as his "legal advisor" and as such is entitled to the same privileges as any licensed attorney. His authority for this argument is apparently premised both on his interpretation of the common-law attorney-client privilege and on Farretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which held that an individual has a constitutional right to defend himself in a criminal proceeding.

Article 38.10, V.A.C.C.P., specifically provided at the time of trial that "an *attorney at law* shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship." Article 38.10 further provided that *all* persons who are not otherwise explicitly enumerated in the Code are competent to testify, "whatever may be the relationship between the defendant and witness...." [FN8]

FN8. The attorney-client privilege was recodified in the Texas Rules of Criminal Evidence Rule 503.

[12] Although the courts in Texas have extended this privilege to "persons who are the media of communication" [FN9] between the attorney and the client, we are unable to discover any authority or rationale to justify the appellant's request that we further extend the privilege to include communications between a defendant and anyone who may take it upon himself to give legal advice to that defendant. The ramifications of such a holding would be beyond calculation.

FN9. Burnett v. State, 642 S.W.2d 765 (Tex.Cr.App.1982).

Moreover, such a result would actually be contrary to the original purpose of the common-law privilege which was to assure that since a layman should "have recourse to the assistance of *professional* lawyers ... he should be able to place unrestricted and unbounded confidence in the *professional* agent." 8 Wigmore, Evidence, § 2291, pp. 546-547, (McNaughton rev. 1961), quoting from *Anderson v. Bank*, 2 Ch.D. 644, 649 (1876). As was explained in *Wigmore*, supra:

"There is no ground for encouraging the relation of client and legal adviser except when the adviser is one who has been formally *admitted to the office of attorney or counselor* as duly qualified to give legal advice.

That the person consulted is in fact practicing, without formal sanction of the court, is certainly not sufficient.... According

to the proposed Uniform Rules of Evidence, a 'lawyer,' for purposes of the privilege, is any 'person authorized ... to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer.'
Finally, a mere *student at law,* aspiring to future entrance to the profession, is without the privilege, however much legal skill he may possess in comparison with some of those who are within it." (emphasis in original) Wigmore, supra at 580-581.

We are also unconvinced by the appellant's argument that by permitting self- representation in *Farretta,* supra, the Supreme Court also authorized the extension of the attorney-client privilege to include "jailhouse lawyers." It would seem that a clearer basis for appellant's proposition would be found in Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), wherein the Supreme Court held that an inmate's right to access to the courts, founded in the Due Process Clause, prohibits prison regulations which bar inmates from furnishing legal assistance to each other "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief." Id., 393 U.S. at 490, 89 S.Ct. at 751. The Supreme Court further held that the prisons could place "reasonable restrictions and restraints" upon the inmates in the exercise of this right. Id., 393 U.S. at 490, 89 S.Ct. at 751.

We could find no specific authority, however, and appellant fails to refer us to any, ***76** to support the proposition that permitting one inmate to assist another in legal matters

automatically elevates that inmate to the role of an attorney at law with all the privileges, responsibilities, and restrictions which accompany a formal license to practice law. We do note, however, that the Louisiana Supreme Court in State v. Spell, 399 So.2d 551 (La.1981), specifically held contrary to appellant's contention in a fact situation similar to and perhaps even more compelling than appellant's. In *Spell,* the defendant contended his statements made to a fellow inmate who was *assigned* to the law library at the prison "to help other prisoners with their legal problems by writing letters, preparing pleadings, and otherwise giving them whatever advice he could" but who was not an attorney and who did not hold himself out as a lawyer were privileged communications. The court held, even under those facts, communications between the two inmates were not subject to the attorney-client privilege.

In light of the foregoing, appellant's second ground of error is overruled.

In his third ground of error, appellant contends that the trial court erred in permitting State's witness Robert Rast, a psychologist, "to testify at the punishment stage of the trial where the witness was a surprise witness and although extensive discovery had been made prior to trial the State had never disclosed that particular witness."

The record reflects that pursuant to appellant's motion, the trial court ordered the State to make known to the defense the names and addresses of its proposed witnesses. The list was furnished to the appellant at the ordered time and three

psychiatrists were included on the list. Rast's name was not included. Appellant's attorney conducted substantial trial preparations in order to effectively cross-examine the three psychiatric witnesses listed. None of those three witnesses were called by the State. Instead, at the punishment phase of the trial, the State called Rast. Appellant objected to the testimony of Rast on the grounds that the witness was a surprise and the defense was not prepared to meet, rebut, or explain the testimony of the witness. The record further reflects that Rast was not contacted by the State regarding testifying in this case until the day before his testimony. Both the prosecutor and the trial judge stated that in a conference conducted on the same day as Rast was contacted, the prosecutor had informed appellant's counsel that Rast would be called as the State's final witness and the three other psychiatric witnesses would not be called. Appellant's attorney stated that he did not recall that Rast's name had been specifically mentioned at the conference.

In a hearing held outside the presence of the jury, Rast testified that he was a clinical psychologist who had never examined appellant nor conferred with him. The following exchange then occurred:

"THE COURT: Mr. Cazier [appellant's attorney], I find it difficult to see how the Defendant would be harmed by not having been advised that this particular person is going to testify. You are not being deprived of any information that the State had previously that hasn't unfolded before all of us in the last few days of this trial with the only exception of this doctor's qualifications.

"I'll let the State establish his qualifications to give an expert

opinion now, and then *if you feel there is something about that that you need additional time to prepare for, I'll consider giving you that time.*
"MR. CAZIER: *Okay.* Let me say for the record ... I have obviously no preparation whatsoever to respond to this witness' testimony? [sic]"

After examination of Rast by both the State and appellant's attorney, the Court further stated:
"I'm trying to be just as fair as I can with you.
"Can you assist me in telling the areas of cross-examination that you would like to explore that somehow you are inhibited by not knowing this was the man that is going to be on the stand? I know you were loaded for bear on the other two doctors."
***77** "MR. CAZIER: Let me ask this witness a couple more questions and *I might.*
"THE COURT: That may be why the State is not calling them. They can do that."

After a few more questions by appellant's counsel, the court held that the witness would be permitted to testify. Appellant's attorney then stated, "We do object for the record." No request was made by the appellant for any continuance, nor did the appellant state in what way he was harmed by the notice failure. Before the jury, Rast testified as to his qualifications and then in response to a hypothetical question propounded by the State testified that the person described was a sociopath and would probably continue to commit future acts of violence. Rast was closely cross-examined by appellant's attorney about any possible bias and

about his knowledge of current authoritative psychiatric literature. During Rast's testimony, appellant further objected because the hypothetical question recited items that were not in evidence and because the opinion of the psychologist as to future dangerousness was not admissible in that the opinion invaded the province of the jury and called for speculation on the part of the witness. Both objections were overruled.

[13][14] The names of witnesses should be disclosed, upon proper motion by the appellant, if they will be used by the State at any stage in the trial. Hightower v. State, 629 S.W.2d 920 (Tex.Cr.App.1981); Young v. State, 547 S.W.2d 23 (Tex.Cr.App.1977). The standard of review when a witness is permitted to testify who was not included on the witness list is whether the trial court abused its discretion in allowing such witness to testify. Pinkerton v. State, 660 S.W.2d 58 (Tex.Cr.App.1983); Hightower, supra; Lincoln v. State, 508 S.W.2d 635 (Tex.Cr.App.1974). See also Bridge v. State, 726 S.W.2d 558 (Tex.Cr.App.1986).

In Hightower, supra, this Court explained the following:
"Among the factors which will be considered by this Court in determining whether there has been an abuse of discretion is a showing of bad faith on the part of the prosecutor in failing to disclose ahead of time the name of the witness. See Clay v. State, 505 S.W.2d 882 (Tex.Cr.App.). [See also Pinkerton, supra; *Lincoln,* supra.] Another such factor is whether the defendant can reasonably anticipate that the witness would testify although his or her name was not included within the witness list. See Smith v. State, 540 S.W.2d 693

(Tex.Cr.App.)." [citations in brackets added]. Hightower, supra at 925.

[15] In the instant cause, it is undisputed that Rast's name was not on the witness list. Appellant has not shown, however, that the State's failure to include the name was in bad faith. Both the prosecutor and the trial court stated that appellant's attorney was notified of Rast's testimony on the same day that Rast was initially contacted by the State. Rast's testimony failed to show that he was particularly biased towards one side or the other. He testified that *he had never before testified for the prosecution in a criminal prosecution* and was not familiar with anyone on the District Attorney's staff. Furthermore, we note that the trial court did all that it could to insure appellant was not unfairly harmed by Rast's testimony by offering to consider a postponement so that appellant could prepare for the testimony, an offer upon which appellant failed to act. Appellant failed to adequately explain to either the trial court or this Court in what way the substitution of Rast's testimony regarding the hypothetical restricted his ability to cross-examine him. See Toler v. State, 546 S.W.2d 290 (Tex.Cr.App.1977).

Appellant, in the same ground of error, asserts that "prosecutors" have seized on the hypothetical question method of presenting psychiatric testimony at the sentencing hearing in a capital murder case in order to avoid the protections afforded capital murder defendants by Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). He contends that, if this is to be permitted, the defense should

at least be *78 given fair notice of the witnesses the State will use.

As the discussion, supra, shows, we do not find that the appellant was denied fair notice under the particular facts of this case. Furthermore, Estelle v. Smith, supra, held that the defendant's Fifth Amendment privilege against compelled self-incrimination was violated in that he was not advised prior to his pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a capital sentencing procedure, as subsequently occurred. We are unconvinced that the holding in *Estelle v. Smith* has any applicability where there is no Fifth Amendment involvement. Moreover, since appellant filed his brief in this case, the Supreme Court in Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), specifically rejected the argument that the use of the hypothetical question as to future dangerousness in a death penalty case such as this requires more stringent rules of evidence than are ordinarily applied. Id., 103 S.Ct. at 3400.

In light of all of the above, we cannot find that the trial court abused its discretion in allowing Rast to testify. Pinkerton, supra; Hightower, supra.

Accordingly, appellant's third ground of error is overruled.

In his fourth ground of error, appellant contends the trial court erred in refusing to permit appellant's counsel to cross-examine and thereby impeach Rhonda Bearden concerning the underlying facts and details of a felony committed by her. In his fifth ground of error, appellant contends the trial court

erred in refusing to issue out-of-state compulsory process for two of the victims of the extraneous offenses committed by Bearden in order to offer evidence concerning the underlying details of the offenses. Appellant and the State in their respective briefs discuss both grounds of error together. We will do the same.

Bearden admitted on direct examination that she was certified as an adult in the juvenile court in Colorado and convicted of second degree kidnapping and violent crime, offenses which occurred in Colorado shortly after the instant offense. During cross-examination, Bearden initially denied that she was promised anything or stood to gain anything by her testimony against appellant. Under further questioning, she admitted she was serving a ten to twelve year prison term and in exchange for her testimony in the instant trial her sentence was to be reduced to three years. Nevertheless, she continued to assert that the sentence reduction was not her reason for testifying. Appellant's counsel further elicited from Bearden that she was originally charged in Colorado with the offenses of first degree kidnapping, violent crime, aggravated robbery, criminal conspiracy, second degree assault, aggravated motor vehicle theft, first degree assault, and conspiracy to commit aggravated robbery.

Appellant's counsel then announced to the court that he proposed "to go into the underlying transactions for which these criminal charges arose." The court recessed the jury and appellant's counsel questioned Bearden outside the presence of the jury.

During this hearing, Bearden testified that she and Franklin were involved in two criminal transactions, occurring on consecutive days in two separate Colorado towns. On the first day, she and Franklin entered the home of an elderly couple after telling them they wanted to use the telephone. They then left the house and returned a few minutes later on the pretext of again using the telephone. Upon once more gaining entry to the home, Bearden handed Franklin a gun and the two robbed the couple, obtaining less than thirty dollars. During the course of the robbery, Franklin put the gun against the chest of the female victim and demanded that she give them a ten dollar bill that the victim was reluctant to relinquish. Franklin and Bearden then tied the hands and feet of the couple and left.

The next day, the pair, along with a third woman, met a man at a bar who was intoxicated and who was carrying a lot of money. The three women and the man left the bar together in the man's car. Bearden later ***79** hit the man on the back of the head with a gun, apparently while he was engaged in sexual intercourse with Franklin in the back seat of the car. Bearden threatened to kill the still-conscious victim if he did not give them his money. When he told the women he had left his money at the bar, the group returned to the bar where he attempted to grab Bearden. Bearden fired a shot into the ceiling and escaped with Franklin in the victim's car. They were arrested shortly thereafter.

Appellant's counsel offered the above-described testimony on the theory that, "[i]t goes to the credibility of the witness. It goes to her motive to testify and it goes to a similarity

between the two transactions, specifically the use of a gun, the tying of the hands and feet of the elderly couple, threat of death." The trial court found the testimony to be inadmissible.

The appellant also requested that two of the Colorado victims be subpoenaed from out-of-state to testify as to the facts of the prior convictions "for purposes of showing the credibility of the State's witness." The trial court denied the request, holding that the testimony would lack materiality. On appeal, appellant cites only Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), as authority for his contentions, claiming that the trial court's actions deprived him of his Sixth Amendment right to confrontation and compulsory process.

In Davis, supra, the defense attempted to impeach a crucial witness for the prosecution by showing that he was on juvenile probation at the time he was assisting the police. The defense claimed that fear or concern of possible jeopardy to his probation could have influenced the witness' identification of the defendant and his testimony at trial. The trial court, however, issued a protective order preventing any reference to the witness' juvenile record. Although defense counsel was permitted to ask the witness general questions concerning *whether* the witness might be biased, he was not permitted to argue the specific reason *why* the witness might have been biased or impartial.

The Supreme Court found that the trial court's actions in restricting the cross-examination of the witness as to possible biases prevented the defense from presenting evidence which could have seriously affected the credibility of this crucial

witness. While the Supreme Court recognized that the State had a legitimate interest in protecting the anonymity of juvenile offenders, the Court held the right of confrontation "*in this setting* " was paramount. 415 U.S. at 319, 94 S.Ct. at 1112.

Thus *Davis'* ultimate holding was that a defendant must be allowed, within certain limits, the freedom to expose a particular witness' possible biases and prejudices against the defendant. In Texas, although at the time of trial Art. 38.29, V.A.C.C.P., provided that only final convictions or probations wherein the period of probation had not expired may be used for purposes of *general* impeachment, in accord with the holding in Davis, supra, the accused is given great latitude in showing any fact which would tend to establish ill feeling, bias, or motive for fabrication on the part of any witness testifying against the accused. Harris v. State, 642 S.W.2d 471 (Tex.Cr.App.1982); Bates v. State, 587 S.W.2d 121 (Tex.Cr.App.1979); Carrillo v. State, 591 S.W.2d 876 (Tex.Cr.App.1979); Simmons v. State, 548 S.W.2d 386 (Tex.Cr.App.1977); Evans v. State, 519 S.W.2d 868 (Tex.Cr.App.1975); Burkhalter v. State, 493 S.W.2d 214 (Tex.Cr.App.1973).

[16] We note that in the instant cause appellant's counsel was permitted to establish such a bias or motive. The jury learned that Bearden had been originally charged with eight offenses, that she had been convicted of second degree kidnapping and violent crime, *and that her ten to twelve year sentences would be reduced to three years after her testimony in the instant cause.* The danger perceived and denounced in Davis, supra,

did not arise here. The appellant was able to fully explore the possible prejudices and biases of Bearden in an attempt to affect her credibility. The *details* of the offenses would not have been probative of bias or motive to testify falsely. See ***80**Murphy v. State, 587 S.W.2d 718 (Tex.Cr.App.1979); Driehs v. State, 164 Tex.Cr.R. 455, 301 S.W.2d 123 (App.1957).

The appellant also contended, however, that the excluded testimony was admissible on the basis that it was "similar." By this we assume he meant that the offenses committed in Colorado were similar in means of commission to the instant offense and that the introduction of the details of the extraneous offenses could have shown that it was possible that the witnesses and not the appellant committed the instant offense. During his closing statement, appellant's counsel ably argued that scenario.

[17][18] Ordinarily, evidence of offenses committed by parties other than the defendant is inadmissible. Franklin v. State, 606 S.W.2d 818 (Tex.Cr.App.1978); Florio v. State, 532 S.W.2d 614, 618 (Tex.Cr.App.1976); Loy v. State, 502 S.W.2d 123 (Tex.Cr.App.1973); Ferrell v. State, 429 S.W.2d 901 (Tex.Cr.App.1968); Daltwas v. State, 375 S.W.2d 732 (Tex.Cr.App.1964); Burke v. State, 642 S.W.2d 197 (Tex.App.--Houston [14th] 1982). [FN10] If the evidence proferred by the defendant is neither inconsistent with nor precludes his guilt, the evidence is not probative of any material issue and is properly excluded. Franklin, supra; Florio, supra; Loy, supra; Dickson v. State, 492 S.W.2d 267 (Tex.Cr.App.1973).

FN10. In Franklin, supra, we held that the trial court properly excluded testimony that a man the defendant claimed had borrowed his car on the night in question had later been arrested and charged with a similar offense; Florio, supra, held that it was proper to exclude evidence that 19 days prior to the offense someone other than the defendant attempted to gain entrance to an apartment in the same manner in which the defendant was charged with entering the complainant's apartment; in Ferrell, supra, we held the trial court did not err in refusing to allow the defendant to prove that another robbery was committed while the defendant "was in jail by robbers using the same type of disguise, weapon and modus operandi"; in Loy, supra, and Daltwas, supra, we held the trial court properly refused to allow the defendants to introduce evidence of the convictions of the defendants' cohabitants for possession of the same substances as involved in the current causes; and in Burke, supra, it was held that the proffered testimony of a police officer that another man who resembled the composite picture of the rapist in the instant case was about to go to trial for a similar abduction of a girl from the same general area was properly excluded. Compare Jackson v. State, 551 S.W.2d 351 (Tex.Cr.App.1977); and Holt v. U.S., 342 F.2d 163 (5th Cir.1965), wherein the defense was misidentification and it was held to be error to forbid introduction of testimony showing that the defendant had actually *previously been misidentified* as a

> particular person who was known to have committed similar offenses as the ones at bar.

In the instant case, the details of the offenses committed by Bearden and Franklin as shown by the appellant's questioning of Bearden outside the presence of the jury, were neither probative of nor inconsistent with the guilt of appellant in the instant cause. The jury was aware of the violent offenses with which Bearden was charged and the convictions which resulted. Appellant's bill of exception failed to demonstrate any connection in similarity or relevance to the instant case, especially when one considers the direct evidence of appellant's guilt, including his confession to Seiver, a person not directly related to this offense. See Williams v. State, 662 S.W.2d 344 (Tex.Cr.App.1983). Given its lack of connection to the offense charged, the trial court did not err in excluding the evidence of the details of the extraneous offenses.

Grounds of error four and five are overruled.

In his sixth ground of error, the appellant contends that the trial court incorrectly denied the indigent appellant "the effective assistance of counsel and compulsory process by not allowing sufficient time and funds to permit defense counsel to obtain the depositions of witnesses in Mexico."

The record reflects that on July 29, 1981, appellant filed a motion to take the depositions of the three women who were residents and citizens of Mexico City, Mexico, and who were in room 494 of the Holiday Inn at the time of the murders.

On July 30, 1981, the trial court heard appellant's motion and ordered the taking of written interrogatories of the three witnesses by a United States diplomatic or consular officer in Mexico City. The trial court ordered appellant's counsel to prepare ***81** his interrogatories and whatever orders were necessary "to bring this about." The commission to take the depositions, apparently prepared by appellant, was signed by the court on August 4, 1981, and forwarded to the United States Embassy in Mexico.

On August 31, 1981, the day the case was set for trial on the merits, appellant filed and urged a motion for continuance asserting, among other things (including that he had not yet been accorded a pretrial hearing on his motion to suppress), that he had been unable to obtain the depositions of the women because the embassy required a $100.00 fee and a court reporter and an interpreter from the United States. The trial court, necessarily aggrieved at this complaint, reminded appellant's counsel that he had agreed to the written interrogatories with the understanding that counsel would work out the details. The court then asked counsel if it was not possible for the witnesses to simply write out their answers before the officer without the necessity of having a court reporter transcribe the answers. Counsel responded that that possibility had not been discussed. The court then instructed counsel that if necessary the official court interpreter could translate the interrogatories into Spanish and the handwritten answers into English. Appellant's counsel stated, however, that all of the witnesses spoke English. The court then went into other matters, including the motion to suppress, without objection from the appellant.

Although the record does not affirmatively reflect the trial court's authorizing the fee payment, appellant in his brief admits the same. The record does contain a copy of a letter, dated September 2, 1981, and filed in the trial court on September 3, 1981, from appellant's counsel to officials at the embassy requesting that the depositions be taken by permitting the witnesses to give their answers in writing in English. The letter also enclosed a $100.00 check to the embassy for its fee. On September 2, 1981, after hearing testimony on the motion to suppress, the trial court finally overruled appellant's motion for continuance after counsel stated "We have no further argument on that motion...." Voir dire examination of the prospective witnesses began on that date. The State began presenting its evidence on September 10, 1981, and rested on September 15, 1981. The defense rested on the same day without presenting evidence.

The record further shows that the $100.00 check and the unanswered interrogatories were returned to appellant's counsel by the embassy pursuant to a request from counsel dated September 21, 1981.

The trial court has wide discretion in either granting or denying applications to take depositions. Art. 39.02, V.A.C.C.P.; Aguilar v. State, 468 S.W.2d 75 (Tex.Cr.App.1971); Beard v. State, 481 S.W.2d 875 (Tex.Cr.App.1972); McKinney v. State, 491 S.W.2d 404 (Tex.Cr.App.1973); James v. State, 546 S.W.2d 306 (Tex.Cr.App.1977).

In this instance, the trial court authorized the taking of written depositions by a diplomatic or consular officer in Mexico City in accordance with Arts. 39.06 and 39.09, V.A.C.C.P. Appellant complains that "the bottom line is that the deposition testimony was never obtained because the court would not authorize the necessary expense." We interpret "the bottom line," however, to be that appellant failed to promptly follow through with the trial court's instructions to pursue the matter.

[19] Although appellant does not directly contest the denial of the motion for continuance, he contends that the trial court's failure to grant him sufficient time to obtain the depositions amounted to a denial of the depositions. We note, however, that trial counsel was appointed on March 10, 1981; trial counsel was notified by mail on May 29, 1981, that the trial on the merits was to begin on August 31, 1981; and yet the motion for depositions was not filed until July 29, 1981. The trial court heard and granted the motion promptly. The record reflects the trial court was not notified of any problems with the depositions *until the day of trial.* Even then, he did not refuse to permit the depositions. He authorized the payment of ***82** the fee to the embassy and suggested reasonable solutions to the other problems appellant's counsel raised with regard to the depositions. Appellant's counsel neither raised objections to the trial court's suggestions nor contended that the depositions were not achievable by the alternative means suggested by the trial court. At no time did the trial court refuse to permit the depositions.

[20] Appellant's argument that the trial court denied him the effective assistance of counsel and compulsory process by not providing sufficient time and funds for a court reporter and an interpreter to fly to Mexico City to obtain the depositions of the witnesses is without merit. Appellant had placed himself in the position of trying to obtain, in one month's time, depositions from witnesses outside the country. He then did not diligently pursue the matter to a satisfactory conclusion.

In addition, we find that the record does not reflect that the trial court specifically denied a request from appellant for funds to obtain the depositions. The trial court authorized the payment of the necessary fee and offered a reasonable and frugal method of obtaining the depositions. See Aguilar, supra; Langston v. State, 416 S.W.2d 821 (Tex.Cr.App.1967). See also Quin v. State, 608 S.W.2d 937 (Tex.Cr.App.1980); Cadd v. State, 587 S.W.2d 736 (Tex.Cr.App.1979).

[21] Furthermore, under Art. 26.05, V.A.C.C.P., counsel is entitled to investigative expenses only *after* they are incurred; even then, reimbursement is discretionary with the court, and refusal to pay expenses before they are incurred is not an abuse of discretion. Wallace v. State, 618 S.W.2d 67 (Tex.Cr.App.1981).

Appellant's sixth ground of error is overruled.

In his seventh ground of error, appellant contends the trial court erred in permitting the State to introduce into evidence during the punishment phase, over appellant's objections, State's Exhibit No. 51, which was a federal judgment and commitment dated March 19, 1973, showing that appellant

pled guilty to "possession of stolen mail containing a U.S. Treasury check" and was sentenced under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b). Appellant contends that the exhibit was inadmissible because the Federal Youth Corrections Act provides for automatic expungement of the conviction upon completion of the sentence. See 18 U.S.C. §§ 5010(b), 5017, 5021; United States v. Arrington, 618 F.2d 1119 (5th Cir.1980).

The record reflects, however, that Federal Probation and Parole Officer Robert Mitchell testified without objection that he supervised appellant after his release on parole for the possession of stolen mail conviction. Mitchell further testified he classified appellant during his parole as a "high risk case," and, although he had the authority, he did not recommend appellant be issued a "certificate of expungement" prior to the time appellant's sentence expired. Instead, appellant's parole was automatically terminated at the expiration of his sentence on March 15, 1979. [FN11]

> FN11. As noted earlier, the instant offense occurred on March 31, 1979.

[22] Appellant's failure to object to the testimony of Mitchell waived any error as to the introduction of State's Exhibit No. 51. Boles v. State, 598 S.W.2d 274 (Tex.Cr.App.1980). Moreover, this Court has consistently held that proof of even unadjudicated extraneous offenses at the punishment phase of a capital murder case is admissible pursuant to the authority of Art. 37.071(a), V.A.C.C.P. Smith v. State, 683 S.W.2d 393 (Tex.Cr.App.1984) (reh'g den. Jan. 30, 1985); Rumbaugh v.

State, 629 S.W.2d 747 (Tex.Cr.App.1982); Williams v. State, 622 S.W.2d 116 (Tex.Cr.App.1981), *cert. denied,* 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982); Crawford v. State, 617 S.W.2d 925 (Tex.Cr.App.1980), *cert. denied* 452 U.S. 931, 101 S.Ct. 3067, 69 L.Ed.2d 431 (1981), *reh. denied,* 453 U.S. 923, 101 S.Ct. 3160, 69 L.Ed.2d 1005 (1981); Milton v. State, 599 S.W.2d 824 (Tex.Cr.App.1980), *reh. denied* 620 S.W.2d 115 (Tex.Cr.App.1980), *cert. denied,* ***83**451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981), *reh. denied,* 453 U.S. 923, 101 S.Ct. 3160, 69 L.Ed.2d 1006 (1981); Brooks v. State, 599 S.W.2d 312 (Tex.Cr.App.1979), *cert. denied,* 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 996 (1981), *reh. denied,* 453 U.S. 950, 102 S.Ct. 25, 69 L.Ed.2d 1036 (1981); Quinones v. State, 592 S.W.2d 933 (Tex.Cr.App.1980),*cert. denied,* 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980), *reh. denied,* 449 U.S. 1027, 101 S.Ct. 600, 66 L.Ed.2d 490 (1980); Green v. State, 587 S.W.2d 167 (Tex.Cr.App.1979), *cert. denied,* 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 996 (1981), *reh. denied,* 453 U.S. 927, 102 S.Ct. 889, 69 L.Ed.2d 1022 (1981); Hammett v. State, 578 S.W.2d 699 (Tex.Cr.App.1979), *pet. dismissed,* 448 U.S. 725, 100 S.Ct. 2905, 65 L.Ed.2d 1086 (1980).

Appellant's seventh ground of error is overruled.

In his eighth and ninth grounds of error, appellant complains of the indictment and court's charge. He contends that the trial court erred in overruling his motion to quash the indictment and in overruling his objections to the court's charge at the guilt-innocence phase of the trial since both the indictment and charge included the culpable mental state "knowingly."

He contends that the insertion of the culpable mental state "knowingly" in the indictment authorizes a conviction for felony murder under V.T.C.A. Penal Code, § 19.02(a)(3), instead of capital murder under V.T.C.A. Penal Code, § 19.03(a)(2), and as such is duplicitous and fails to give him precise notice of the charge against him. He further argues that the charge of the court is ambiguous in that it authorizes the jury to convict upon a finding of a culpable mental state less than that permitted by statute. [FN12]

FN12. See V.T.C.A. Penal Code, § 6.02(d).

Appellant's indictment, in pertinent part, alleged that the appellant:
"did then and there intentionally *and* knowingly cause the death of an individual, namely: JOHN G. EBBERT, hereinafter called complainant, by SHOOTING THE SAID COMPLAINANT WITH A GUN, and the said defendant did then and there intentionally cause the death of the said complainant while in the course of committing and attempting to commit the offense of ROBBERY, AGAINST THE SAID COMPLAINANT..."

The court's charge to the jury stated in pertinent part:
"Now if you find from the evidence beyond a reasonable doubt that ... Miguel A. Richardson, did intentionally or knowingly cause the death of John G. Ebbert, by shooting the said John G. Ebbert with a gun, and the said Miguel A. Richardson, did then and there intentionally cause the death of the said John G. Ebbert while in the course of committing or

attempting to commit robbery of John G. Ebbert, you will find the defendant guilty of capital murder."

Thus the portion of the charge that applies the law to the facts strictly followed the allegations in the indictment by authorizing the jury to convict if they found the defendant intentionally or [FN13] knowingly caused the death of the victim *and* intentionally caused the death while in the course of committing or attempting to commit the robbery of the victim.

> FN13. The appellant does not complain of the discrepancy between the indictment's "intentionally *and* knowingly" and the "intentionally *or* knowingly" language in the court's charge to the jury. We have held in the past that such does not constitute error. Hammett, supra. See also Cowan v. State, 562 S.W.2d 236 (Tex.Cr.App.1978).

[23] Capital murder is committed when a person commits murder, V.T.C.A. Penal Code, § 19.02(a)(1), with at least one of the aggravating factors contained in the capital murder statute, V.T.C.A. Penal Code, § 19.03. [FN14] Combining the elements of the two statutes we find that capital murder ***84** under § 19.03(a)(2) is committed when a person intentionally or knowingly causes the death of an individual (murder under § 19.02(a) (1)) *and* intentionally commits the murder in the course of committing or attempting to commit robbery. That is precisely what the indictment and the court's charge to the jury authorized in the instant cause. We have in the past implicitly approved of similar indictments and charges.

Wilder v. State, 583 S.W.2d 349 (Tex.Cr.App.1979), judgment vacated and case remanded on other grounds, 453 U.S. 902, 101 S.Ct. 3133, 69 L.Ed.2d 987 (1981), opinion on remand, 623 S.W.2d 650 (1981); Hammett, supra; Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App.1976), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977); White v. State, 543 S.W.2d 104 (Tex.Cr.App.1976), *cert. denied,* 430 U.S. 988, 97 S.Ct. 1689, 52 L.Ed.2d 384 (1977).

> FN14. V.T.C.A. Penal Code, § 19.03, the capital murder statute, provides in pertinent part:
> "(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and: ...
> "(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson...."

[24] Article 21.02, V.A.C.C.P., provides that in an indictment, the offense must be set forth in plain and intelligible words. Further, Art. 21.11, V.A.C.C.P., provides an indictment "shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged."

In turn, the trial court's charge to the jury generally should correspond to the allegations in the indictment. Jackson v.

State, 633 S.W.2d 897 (Tex.Cr.App.1982); Booker v. State, 523 S.W.2d 413 (Tex.Cr.App.1975).

[25] The indictment in question literally followed the statute, was written in ordinary and concise language, and neither mislead appellant nor failed to give him fair notice of the offense charged. Moreover, we find that the indictment clearly alleges that appellant is being charged with capital murder under § 19.03(a)(2), and not felony murder under § 19.02(a)(3).

[26] We also find that the court's charge, which properly required that the jury find that the appellant *intentionally* caused the death while in the course of committing or attempting to commit robbery, properly tracked the indictment and the statute and was neither ambiguous nor did it permit the jury to convict the appellant upon a finding of a culpable mental state less than that required by statute.

Appellant's eighth and ninth grounds of error are overruled.

In his tenth ground of error, appellant contends the trial court erred in permitting the State to introduce into evidence certain items seized during a search of appellant's car by Colorado police officers pursuant to a search warrant issued by a Colorado magistrate. The items seized and introduced at trial were two wigs, a business card for "On the Top in High Fashion Modeling Agency," and an invoice for the purchase of business cards for the same modeling agency.

The State's apparent motive in introducing the invoice and business card was to prove that appellant was the man who

was registered at the Holiday Inn at the time of the offenses under the alias of Michael Coleman and who stated on the hotel registration card that his firm was called "On the Top in High Fashion." The record reflects, however, that this fact was clearly established in the record by the testimony of the State's witnesses. All three of the women who were traveling with appellant testified appellant was staying at the Holiday Inn at the time of the murders; Bearden testified that appellant often used aliases and checked into the Holiday Inn on the date in question under the alias Michael Coleman; Seiver testified that appellant admitted being a registered guest, under the alias of Coleman, at the Holiday Inn at the time he killed the security officers; and, most significantly, *the desk clerk who registered appellant clearly identified appellant as the man who registered as Michael Coleman and who stated his company was called "On the Top in High Fashion."* That appellant was a registered guest at the Holiday Inn at the time of the offense was established beyond a reasonable doubt by evidence separate from that seized as a result of the Colorado search.

***85** [27] The two wigs were apparently offered by the State in an attempt to corroborate the testimony of Bearden and Franklin that appellant told them he had put on a wig on the night in question in order to disguise himself during his attempt at robbing the women in room 494. The record reflects, however, that appellant also told Seiver that he oftentimes wore a wig as a disguise and that he was wearing one at the time of the shooting. Accordingly, testimony other than that obtained as a result of the search established that fact. We also note that whether or not appellant was wearing a

wig at the time of the offense, under the facts of this case, is of little moment to the identity of appellant as the person who murdered the two guards.

Without reaching the merits of appellant's claims regarding the legality of the search and seizure of the items, we find that the admission of the items was cumulative and harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Nickerson v. State, 660 S.W.2d 825 (Tex.Cr.App.1983); Wood v. State, 573 S.W.2d 207 (Tex.Cr.App.1978).

Appellant's tenth ground of error is overruled.

Appellant's eleventh ground of error, concerning voir dire, was disposed of at the beginning of this opinion and was overruled.

In his twelfth and final ground of error, appellant contends that the trial court erred in refusing his requested charges at the punishment phase of the trial regarding mitigation. This Court has consistently overruled similar grounds of error made by other defendants. Stewart v. State, 686 S.W.2d 118 (Tex.Cr.App.1984); Quinones v. State, 592 S.W.2d 933 (Tex.Cr.App.1980), cert. denied, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980), reh. denied, 449 U.S. 1027, 101 S.Ct. 600, 66 L.Ed.2d 490 (1980). We decline to overrule same. [FN15]

> FN15. Although the author of this opinion joined in the dissenting opinion in Stewart, supra, concerning

> this same issue, the rules of stare decisis compel the above holding. Johnson v. State, 691 S.W.2d 619, (Tex.Cr.App.1984) (Clinton, J., concurring).

Appellant's twelfth ground of error is overruled.

Appellant has also filed a pro se writ of habeas corpus which we deem a pro se brief. Although appellant is not entitled to hybrid representation, we have in the interest of justice examined same and find no error that should be considered in the interest of justice. Rudd v. State, 616 S.W.2d 623 (Tex.Cr.App.1981).

The judgment of the trial court is affirmed.

WHITE, J., not participating.

CLINTON, Judge, dissenting.

The treatment given to appellant's ground of error eleven is erroneous in two respects, in my view. First, the majority is wrong to dismiss appellant's complaint against the *sua sponte* nature of the trial court's action on the basis that such complaint does not comport with his trial objection. The majority would require appellant to articulate what was obvious to all present, indeed is obvious from the cold record, *viz:* that he was objecting to *the trial court's* exclusion of the venireman on the basis of Article 35.16(a)(10), V.A.C.C.P., when the full predicate for such exclusion had not been laid by either the trial court or the State. To hold that error was not preserved in this context is just pedantic, Moore v. State, 542 S.W.2d 664, 668 (Tex.Cr.App.1976) notwithstanding. See

Hernandez v. State, 643 S.W.2d 397 (Tex.Cr.App.1983) (Teague, J., dissenting).

More disturbing, however, is the analysis by which the majority distinguishes Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981). After observing that it was in response to a challenge for cause from the State that the venireman in *Grijalva* had been erroneously excused, the majority concludes:
"The State in no way prompted the erroneous excusal nor did it have an opportunity to timely exercise a peremptory challenge against him. [footnote omitted.] In short, this venire member was never passed first to the State and then to the ***86** appellant for challenges according to the requirements of Art. 35.13, V.A.C.C.P. Thus, the 'corruption of the peremptory strike practice' that gave the state 'an unfair advantage,' so condemned in *Grijalva,* is absent from this case."

At p. 71, quoting Bell v. State, 724 S.W.2d 780, at 796 (Tex.Cr.App.1986). With deference, this facile distinction does not withstand scrutiny.

In *Grijalva,* no less than in the instant case, opportunity for the orderly conduct of peremptory challenges by *both* sides was preempted by erroneous excusal of the venireman by the trial court. That here that excusal was *sua sponte* does not invalidate the rationale of *Grijalva.* Whether the venireman was excused in response to a State's challenge for cause or *sua sponte,* to call the erroneous excusal harmless on the basis that the State had remaining peremptories is effectively to afford the State an out of time peremptory challenge (or, as

the majority labels it, "constructive use" of a remaining peremptory) to retroactively correct the error. Circumvention of the statutorily mandated order for the exercise of peremptory challenges in a capital case is just as manifest here as it was in *Grijalva*. [FN*]

FN* In *Bell v. State*, supra, at 796, the Court elaborated upon its present rationale in similarly distinguishing *Grijalva*, thus:
"... *Grijalva* is founded on the notion that the State *caused* the improper excusal by issuing a challenge for cause, and is therefore penalized because of the advantages it would otherwise receive by holding a peremptory strike back. Where the trial judge, not the State, is solely responsible for the improper excusal, the justification for penalizing the State under *Grijalva* disappears." I had not understood *Grijalva* to be "founded on the notion that the State *caused* the improper excusal," and should therefore be "penalized." I should think that, inasmuch as it is said to thwart the dictates of Article 35.13, supra, by giving the State "the benefit of making its judgments with a perspective of the entire panel, a perspective which is not given the defendant[,]" 614 S.W.2d at 424, to allow retroactive application of remaining State peremptories to cure the otherwise reversible error of excusing a qualified venireman over objection would be equally disruptive whether the State "caused" the trial court to excuse the venireman or the court acted of its own volition. The point is not to penalize the State, but to avoid penalizing the defendant.

Finding no meaningful distinction between this case and *Grijalva,* I respectfully dissent.

TEAGUE and DUNCAN, JJ., join this opinion.

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IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE MIGUEL
A. RICHARDSON

Habeas Corpus Application

WRIT NO. 29,821-02

From BEXAR County

ORDER

This is an application for a writ of habeas corpus transmitted to this Court pursuant to the provisions of Article 11.071, V.A.C.C.P. Applicant was convicted of capital murder in the 175th District Court of Bexar County and sentence was assessed at death following affirmative replies to the special issues submitted to the jury pursuant to Article 37.071, V.A.C.C.P.

In the present application Applicant raises fifteen allegations challenging the conviction or the penalty assessed. An evidentiary hearing was conducted by the trial court after which the judge entered findings of fact and conclusions of law and a recommendation that all relief requested be denied. We have reviewed the record from that hearing along with the application itself and its supporting documentation. We find that the findings of fact and conclusions of law are fully supported by the record and that the recommendation should be followed.

Accordingly, all relief requested is denied.

IT IS SO ORDERED THIS THE 10TH DAY OF JUNE, 1998

PER CURIAM

DO NOT PUBLISH

EX PARTE MIGUEL A. RICHARDSON
WRIT NO. 29,821-02

Habeas Corpus Application from BEXAR County

DISSENTING OPINION

This is a post-conviction application for writ of habeas corpus filed pursuant to Tex. Code. Crim. Proc. Ann. art: 11.071.[1] Applicant presents a claim for relief based upon a belief that his "constitutional rights to the effective assistance of counsel, to present mitigating evidence, and to due process and a fair trial were violated by the trial court's

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[1] The procedural history of applicant's case is as follows:

- Defendant was convicted of capital murder in Bexar County on Sept. 10, 1981.
- We affirmed, 744 S.W.2d 65 (Tex.Cr.App. 1987).
- On petition for writ of certiorari, the United States Supreme Court vacated and remanded, 492 U.S. 914, 109 S.Ct. 3235.
- On remand, we again affirmed, 886 S.W.2d 769 (Tex.Cr.App. 1991).
- On petition for writ of certiorari, the United States Supreme Court again vacated and remanded, 113 S.Ct. 3026.
- On remand, we again affirmed, holding that: (1) evidence of defendant's voluntary service and kindness to others, artistic and poetic talent, and religious devotion, did not require separate special jury charge during punishment phase; and (2) allegedly mitigating evidence of defendant's character and upbringing did not require separate special jury charge. 901 S.W.2d 941 (Tex.Cr.App. 1994)
- Certiorari was denied June 26, 1995. 115 S.Ct. 2617.

allowance of the testimony of Dr. Rast, a surprise witness.[2] Believing this claim should be remanded to the habeas court for findings of fact in light of Estelle v. Smith, 602 F.2d 694 (5th Cir. 1979), I dissent.

Originally the State had filed a witness list with no doctors, psychiatrists or psychologists designated. Upon inquiry from the defense, the State amended the witness list to include Dr. Grigson and Dr. Schroeder as expert witnesses. However at trial, the State did not call either of these designated expert witnesses; instead, the State called Dr. Rast, who was not on the State's witness list. The defense objected stating:

> The Defendant has never been apprised that this gentleman on the witness stand will be a witness. We don't know who he is. We don't know what he is. I've never heard his name before it was called by the prosecutor to bring the man into the courtroom. We are surprised. We are not prepared to meet, explain or rebut his testimony, whatever it may be. We have no idea what it may be. I understand the man may be a psychologist.

R. Vol. VII, pp 184-85.

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[2] Contrary to the trial judge's assertion that this claim for relief was raised and rejected on direct appeal, this issue was never raised under the constitutional parameters of the Sixth and Fourteenth Amendments.

The defense cited Smith v. Estelle, 602 F. 2d 694, 699 (5th Cir. 1979), aff'd on other grounds, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), as support against the surprise testimony of Dr. Rast. In Smith, the Fifth Circuit affirmed the district court's granting of habeas relief, holding the testimony of the surprise witness, Dr. Grigson, violated Smith's Sixth and Fourteenth Amendment Rights to the effective assistance of counsel, his Eighth Amendment right to present mitigating circumstances, and his Fifth Amendment right not to be forced to incriminate himself. Id. 602 F.2d at 698. The Fifth Circuit held:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for (defense) counsel to challenge the accuracy or materiality of" evidence, Gardner v. Florida, 430 U.S. at 357, 97 S.Ct. at 1204, and in foreclosing "that debate between adversaries (which) is often essential to the truth-seeking function of trials," Id. at 360, 97 S.Ct. at 1206.... And despite the trial court's order that the state's attorney list "all the State's witness whom he in good faith expects to use at the trial of the State's case in chief, both during the guilt or innocence state (sic) and the punishment stage," App. 97, the prosecution did not list Dr. Grigson's name. The consequences of this surprise were devastating. Thus the trial judge's informality and the prosecution's tactics combined to give Smith's attorney's no chance to prepare an effective response to Dr. Grigson's testimony or to impeach it

> in any significant way. Surprise in this case impaired "the interest in reliability," Id. at 359, 97 S.Ct. 1197 as much as secrecy did in Gardner.

Smith, 602 F.2d at 700-01.

The difference between Smith and the instant case is that Dr. Rast did not interview applicant, but instead offered an opinion of a hypothetical defendant who committed exactly the same offense as applicant. However, the reasoning of the Fifth Circuit applies here. Defense counsel was completely surprised by Dr. Rast and objected on the record, stating he was unprepared to cross-examine the surprise witness. In fact, the trial judge acknowledged defense counsel was fully prepared to cross-examine the listed witnesses, stating, "I know you were loaded for bear on the other two doctors." R. Vol. VII, pp 197-98.

With these comments, I dissent.

BAIRD, Judge

Overstreet, J., joins this opinion but also believes the first and seventh claims for relief should be filed and set.
Delivered: June 10, 1998
En Banc
Do No Publish

(3) Supreme Court, U.S.
FILED

001611 APR 20 2001

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL RICHARDSON,
Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II, PAGES 296-486

THIS IS A CAPITAL CASE

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192RD

Texas Code of Criminal Procedure Article 37.071 (in effect in 1981)

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Art. 35.22. Oath to jury

When the jury has been selected, the following oath shall be administered them by the court or under its direction: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God".

Art. 35.16. [616] [692] [673] Reasons for challenge for cause

(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

1. That he is not a qualified voter in the state and county under the Constitution and laws of the state; provided, however, the failure to register to vote shall not be a disqualification;

2. That he has been convicted of theft or any felony;

3. That he is under indictment or other legal accusation for theft or any felony;

4. That he is insane;

5. That he has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service, or that he is legally blind and the court in its discretion is not satisfied that he is fit for jury service in that particular case;

6. That he is a witness in the case;

7. That he served on the grand jury which found the indictment;

8. That he served on a petit jury in a former trial of the same case;

9. That he has a bias or prejudice in favor of or against the defendant;

10. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged without further interrogation by either party or the court. If he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged;

11. That he cannot read or write.

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. 1

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. ONE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character of record, and any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or note the true answer to any of the Special Issue is "Yes"; and in the event such evidence does so cause you to

have such a reasonable doubt, you should answer the Issue 'No.'"

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. One is illegible.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. TWO

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. TWO

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that, in order to answer any of the Special Issues 'yes,' the Jury must believe unanimously, beyond a reasonable doubt, that the true answer to the Issue is 'Yes.' In order to answer any Issue 'No,' however, it is only necessary that ten of the jurors believe that the correct answer is 'No.' An answer of 'No' may be given to any of the Issues if:

"1) at least ten (10) jurors have a reasonable doubt as to whether or not the correct answer should be 'Yes'; or

"2) if at least ten (10) jurors find that mitigating factors against the imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense which have been admitted in evidence before you; or

"3) if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the Issue is Yes.'"

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Two is denied.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. THREE

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. THREE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer any of the Special Issues 'No' if you find any aspect of the Defendant's character or record or any of the circumstances

of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is denied.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. FOUR

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. FOUR

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer Special Issue No. One 'No' if you find any aspect of the

Defendant's character or record as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is denied.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. FIVE

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. FIVE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer Special Issue No. 2 'No' if you find any aspect of the

Defendant's character or record as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is denied.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. SIX

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. SIX

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"During your deliberations as to the answers to be given to the special issues, you are not to consider how much of his sentence the Defendant would be required to serve before being released on parole, if his punishment is assessed at life imprisonment. You are instructed, however, that under the law, a person who is serving a sentence of life imprisonment for the offense of Capital Murder may not be

considered for release on parole until his actual calendar time served, without consideration of good conduct time, is twenty (20) years."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is denied.

illegible
JUDGE PRESIDING

SUPPLEMENTAL CHARGE

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

SUPPLEMENTAL CHARGE

MEMBERS OF THE JURY:

To answer either issue "yes" all twelve (12) jurors must agree beyond a reasonable doubt that the answer should be "yes."

To answer a question "no" as many as ten 910) jurors must agree that the answer should be "no."

Please continue your deliberations.

Respectfully submitted,

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge Presiding

CHARGE OF THE COURT ON PUNISHMENT

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

CHARGE OF THE COURT ON PUNISHMENT

MEMBERS OF THE JURY:

By your verdict returned in this case, you have found the Defendant guilty of capital murder, as alleged in the indictment. You are instructed that a sentence of life or death is mandatory upon conviction of a capital offense. It now becomes your duty to determine, from all the evidence in this case, the answers to certain questions which are called in this charge special issues, as follows:

SPECIAL ISSUE I

Was the conduct of the defendant that cause the death committed deliberately and with the reasonable expectation that the death of John G. Ebbert would result?

SPECIAL ISSUE II

Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

You will answer each of these special issues either "yes" or "no."

In order for the jury to answer a special issue "yes" the jurors must unanimously concur that the answer is "yes" beyond a reasonable doubt regarding that special issue.

Any juror who entertains a reasonable doubt that the answer is "yes" as to a special issue shall vote "no" in the jury deliberations regarding that special issue. If ten or more jurors vote "no" in the jury deliberations as to a special issue, then the answer of the jury is "no" regarding that special issue.

You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the trial of the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

You are further instructed that if the jury returns an affirmative finding on each of the two Issues submitted, this Court shall sentence the defendant to death. If the jury returns a negative finding on any Issue submitted, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight

to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

Respectfully submitted,

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge of the 175th Judicial District
Court of Bexar County, Texas

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

VERDICT FORM

SPECIAL ISSUE I

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Miguel A. Richardson, that caused the death of the deceased was committee deliberately and with the reasonable expectation that the death of the deceased would result?

ANSWER: Yes

SPECIAL ISSUE II

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Miguel A. Richardson, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: Yes

We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in this case.

illegible
Foreman of the Jury

BY THE COURT:

Q. You are William Graves Noble?

A. That's right.

Q. Mr. Noble, in a trial such as this we divide the responsibilities for decision making between the Judge and the jury. The Judge has the responsibility of making decisions on legal questions or law questions and the jury makes the decision on the factual issues.

You do this by listening to the testimony of the witnesses, deciding which ones you believe, which ones you don't believe, how much you believe them and when the evidence is all over the jury goes in the jury room, deliberates on the issue, reaches a verdict either finding the Defendant guilty or not guilty.

And if he's found guilty you go to the punishment phase of the trial and you will get more evidence, go back into deliberation again, talk about it and answer the questions that we ask. This is what we mean by deliberating on the fact issues.

If a Defendant is found guilty of Capital Murder he must receive one of two mandatory punishments either life imprisonment or Death. My question to you, sir, is would your knowledge of the mandatory punishments of life imprisonment or Death effect your deliberation on any of the fact issues?

A. I'm not sure what you mean by the question.

THE COURT: I can ask it again but it's going to come out just about the same way.

THE WITNESS: Ask it again.

THE COURT: You understand what the mandatory punishments are?

A. Yes.

Q. You understand what I mean by deliberating on fact issues?

A. Yes.

Q. Would your knowledge of the mandatory punishment of life imprisonment or Death effect your deliberation on the fact issues?

A. I don't think so.

THE COURT: The State may inquire.

* * * * * *

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Good morning, Mr. Noble.

A. Good morning.

Q. Following up on the question that Judge Dial just asked I'll ask another question that may be just as difficult in understanding, hopefully not. Do you have

conscientious scruples against the infliction of the Death Penalty in a Capital case?

A. Yes. I. do.

Q. All right. You are opposed to the Death Penalty?

A. I am.

Q. Is your opposition to the Death Penalty such that under no set of facts or circumstances could you ever sit as a juror in such a manner as the Death Penalty would be inflicted?

A. That's not easy to answer yes or not. I know and theoretically I realize society has to make rules to protect itself and it may be that the Death Penalty is a necessary part of those rules. Emotionally and spiritually I'm not so sure I could make the decision.

Q. All right. Well, I want to explore that just for a minute. I'll tell you right off the bat in this case the State is asking for the Death Penalty. If you are selected as a juror it could come to pass that the jurors would be required to make a determination in answering the two questions that we talked to you about yesterday as to whether or not the Death Penalty was going to be imposed.

Now, with your opinion about the Death Penalty, do you feel that you could not put yourself in that position to vote in such a manner as to cause infliction of the Death Penalty?

A. I do.

Q. Insofar as your opinion about the Death Penalty, are you irrevocably committed before trial to automatically voting against the Death Penalty regardless of the facts and circumstances that might come to light?

A. I feel I am. Yes, I have given it a lot of thought.

Q. Now, the two questions that would be asked of the jury at the second part of the trial. You know that the jury is not asked to give either a life sentence or the Death Penalty. What they do is answer two questions. Based upon the answers to those two questions the Judge will either give a life sentence or the Death Penalty.

The first question that is asked of the jury at the second part of the trial is whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased or another would result. In other words, did the Defendant commit the act deliberately.

And the jury would be asked to answer that question either yes it was deliberate or no it wasn't. The second question that would be asked the jury is whether there would be a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

The jury would be asked to answer either yes there is a probability that he would be a continuing threat to society or no. If the jury answers those two questions yes the Judge has no alternative but no impose the Death Penalty.

Now, is your opinion about the Death Penalty such that you would, regardless of the evidence, answer one

of those questions no in order to insure that the Death Penalty would not be imposed?

A. I think I would feel very uncomfortable about it because I would know that my decision would be involved in the ultimate decision.

Q. And regardless of the evidence your opinion about the Death Penalty would effect your answers to these questions?

A. I think it would.

MR. BURRIS: We'll go ahead and move for cause, Your Honor.

THE COURT: Are you challenging for cause at this time?

MR. BURRIS: Yes.

THE COURT: All right. Mr. Noble, you would be instructed as to the law and you would be told that if you believed a certain set of facts beyond a reasonable doubt then you should answer it one way or the other. If you believe it beyond a reasonable double you are to answer it yes. If you do not believe it beyond a reasonable doubt you would answer it no.

And you would take an oath that you would render a verdict based on the law and the evidence and instructed. My question is, is your feeling about the Death Penalty so strong that you would not be able to follow your oath as a juror and base your verdict on the evidence as you believe it to be?

THE WITNESS: Well, I think I would have to wrestle long and hard with the oath for sure.

THE COURT: I understand that.

THE WITNESS: But I feel opposed to the Death Penalty and I think it would have an effect on my decision.

THE COURT: All right. Now, I understand that you say it would effect it and we are going to have to push you a little farther than that. My question is, you know, a juror takes an oath that you will render a true verdict according to the law and the evidence.

The law is that if you believe the evidence beyond a reasonable doubt that you would answer, you would find a defendant guilty and you would answer the issues affirmatively if you find the evidence to be that way. That is what the oath is. And so I'm asking you now, would you be able to follow that oath?

THE WITNESS: Well, Your Honor, I would follow the oath. I think I would have to do that. I wouldn't feel very comfortable about doing it.

THE COURT: I can appreciate that and I will overrule the challenge.

* * * * * *

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Mr. Noble, when was it in your life that you became opposed to the Death Penalty?

A. Well, I don't think I could –

Q. Was it since childhood or religious upbringing?

A. It is involved in my religious background, yes, but I couldn't say at any specific time or date I became opposed to it. I think it's something that just kind of grew. I have a son-in-law in ministry and he has had some effect on my thinking.

Q. All right. Now, you realize that if you are selected as a juror in this case and the Defendant is found guilty you are going to be called upon to answer those two questions?

A. Uh-huh.

Q. Can you assure me that you will answer those two questions based upon the evidence that you hear in the case?

MR. CAZIER: Objection. The prosecutor is undertaking to commit the juror to a commitment in this particular case. I object to it.

THE COURT: You may not ask what his answer will be, but if he will base it on the evidence. The objection is overruled.

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Can you assure me that you will answer those two questions based upon the evidence that you hear in the case?

A. Well, if I said, no I would be contradicting the answer I gave Judge Dial. I would have to.

Q. I'm not asking you to not contradict yourself or to contradict yourself, I'm asking you just to tell me just as honestly as you can so that I will know whether or not you can sit here as a fair and unbiased juror and do the job that the jurors must do?

A. If I were a juror I would try to serve to the best of my ability. That's what I can say.

Q. All right.

A. You used a couple of words there, bias and impartial that I think you might want to pursue.

Q. Well, are you biased in some manner about this case?

A. Well, I have read quite a bit about it. And I feel that I have already prejudged the case. I mean I take all the newspapers. I'm a journalist by profession and I know – I don't disregard what I see in the paper.

THE COURT: Have you already formed an opinion as to the guilt or innocence?

THE WITNESS: Yes, Your Honor. I think it's only fair that I say that I have formed an opinion.

THE COURT: You will be excused Mr. Noble. You can return to the Central Jury Room. They will discharge you from there.

* * * * * *

MR. CAZIER: If the Court please, the Defendant objects to Mr. Noble being excused, the entire predicate not having been laid for his excuse.

THE COURT: You are excused.

* * * * * *

THE COURT: The statute provides if the juror states from hearsay or otherwise he has already formed an opinion as to the guilt or innocence of the Defendant there will be no further questioning.

MR. CAZIER: Does it say one more sentence?

THE COURT: Can you do one in ten minutes?

MR. WILLIAMS: No, sir.

MR. CAZIER: I would say that we—

THE COURT: Mr. Williams says no. I'm accept that. Let's recess until 1:30, gentlemen.

RECESS

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

• • • • •

Please.

THE COURT: Please be seated.

DIRECT EXAMINIATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, ma'am?

A. Lillie Rex.

Q. Where are you from, Mrs. Rex?

A . Oklahoma City.

Q. How old are you?

A. Sixty-five.

Q. Are you married or single?

A. Yes. I'm married.

Q. Where do you live in Oklahoma City?

A. 1117 Northeast thirty-eighth.

Q. Do you know Miguel A. Richardson?

A. Yes. I do.

Q. How long have you known him?

A. About twenty years.

Q. When did you first come to know him?

A. Oh, his family and I all belonged to the same church.

Q. All right. Did you come to know Miguel and his family at church?

A. Yes.

Q. Were you a Sunday school teacher?

A. Yes.

Q. Are you still a Sunday school teacher?

A. No. Not now.

Q. Did you come to know Miguel Richardson in connection with your teaching Sunday School?

A. Right. Well, before then, but he finally came to my class, you know.

Q. All right. Was he a good student?

A. Yes. He was.

Q. What did Miguel do there at church as far as his activities in connection with the church?

A. Oh, he was a Walter Lee. You know, in our church the youngsters, they call it the Walter Lee. All the way down the line until he was a teenager he was a Walter Lee.

Q. Did he have trouble getting along with the other kids when he was at church?

A. Not that I know of.

Q. Okay.

A. Just the usual, you know, kids.

Q. Was he faithful about coming to Sunday school?

A. Yes, he was.

Q. Did the other Richardson children come?

A. All of them. Yes.

Q. Do you know his parents and brothers and sisters?

A. Yes.

Q. Have you stayed in touch with Miguel over the past years?

A. Until he was a grown man and left home.

Q. Did you folks have some problems with integration there in Oklahoma City whenever Miguel was in his last years in high school?

A. Oh, yeah. It was nation wide. I'm sure everyone heard about it.

Q. What problems in particular did you have there in Oklahoma City?

A. Well, integrating in school, what have you, sanitary deal.

Q. Sanitary workmen's strike?

A. Yes.

Q. Was there a lot of racial controversy there in Oklahoma during that time?

A. Oh, yes.

Q. Was Miguel Richardson one of the black students that integrated to a white school?

A. Yes. All the children there were integrated into the white school.

Q. Did you people there at the church in particular have occasion to counsel with and work with Miguel Richardson and the other students in connection with integration?

A. Yes.

MR. CAZIER: Thank you, Miss Rex.

Pass the witness.

* * * * *

MR. BURRIS: I don't have any questions.

THE COURT: You are excused, ma'am. Thank you very much.

* * * * *

MR. CAZIER: Pastor Kabelitz.

THE COURT: Would you please be sworn.

THE WITNESS: Yes, sir.

WHEREUPON,

NORB KABELITZ

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

• • • • •

DIRECT EXAMIMATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, sir?

A. Pastor Norb Kabelitz.

Q. Spell your last name?

A. K-A-B-E-L-I-T-Z.

Q. You are a pastor at what church?

A. Redemer Lutheran Church, Oklahoma City.

Q. How long have you been at that church?

A. I have been there since October 1966, fifteen years.

Q. All right. What educational qualifications and experiences do you have to qualify you to be a pastor?

A. I have four years of college. I have four years of university, three years of post graduate work, and I was recently given an honorary doctorate from the seminary.

Q. Do you know the Defendant in this case, Miguel Antonio Richardson?

A. Yes, sir.

Q. Do you know his parents?

A. Yes.

Q. Do you know his brothers and sisters?

A. Yes.

Q. How long have you known him?

A. I have known them since I had come to Oklahoma City at the time when Miguel was eleven years old.

Q. How did you come to know Miguel Richardson?

A. As pastor, and my first experience with Miguel would have been the first program for the church and first programs for communion classes, which my daughter was also a part, and about ten of them in Miguel's group as we

began to prepare them for their first communion, and also later on for the confirmation classes.

I was able to observe him, the dynamics of his relationships with the others. I was able to help him in the learning process. I noticed one disability that he had that we had to cop with constantly, that he wasn't able to read very well. And this effected self image and the peer relationships.

We sought to overcome that by providing visual improvements leading to his support. Even there, because some of the others suffered with that, and we had a good group that year. It was a little pioneer group for the parrish, my first time. There being white being in a black community created it's on dynamics and the parrish. The philosophy redeemer that we unpacked in both our celebration and in our message that was going to be a community that would be a bridge between black and white, between controversial issues, and we were going to be the bridge, that would weld where ever possible, the community together. And therefore the environment in which we grew in the 60's, all the young people that grew up in the 60's is the struggling group that I like to observe, and as I reflect now and I see people who have come out of the 60's and early 70's. We have lost forty percent of them because of the controversy through which this nation was going. Now it hit Oklahoma City on two major issues.

Q. Before we get into that, pastor, let me get into a little more about your person to person relationship.

MR. BURRIS: I don't like for him interrupting the witness. I was very interested in what he was having to say.

MR. CAZIER: Please do.

THE COURT: You may restate your question.

MR. CAZIER: I withdraw that question. Please continue with your answer.

THE WITNESS: Miguel is part of the melee and I'm trying to describe the context in which my relationship with Miguel, the parrish, the community which Miguel was a part as he watched it you unfold. I think it places a very important role as to what has gone on in this young man's life.

The two major issues that confronted the city, of course, were desegregation. Oklahoma was a locked in segregated city. I served as a member of the 36th Advisory Citizen Panel, that over the years spelled out how we would begin to make Oklahoma City a first class American city where no American would be discriminated on the basis of color where people would once and for all learn how to begin to live together under a law and justice.

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What part did you play in actually play in the integration of schools there?

A. I was one part of the major committee that made recommendations to the school board.

Q. Did you actually have occasion to patrol the hallways of the schools?

A. Yes, sir. This came about when the conflict emerged and Oklahoma City schools desegregated. Conflict, particularly in one of the schools where you had a particular

strong sentiment in the city that was opposed to carrying out the law and where parents had deliberately set a blaze emotions and feelings with burnings at night, rallies, name calling picked up by the TV broadcasts throughout the city, which then was reflected in the kids in the school, and you had a black-white confrontation in the school of which Miguel was part there at that particular school.

Q. If you would focus yourself on Miguel's part?

A. Pardon?

Q. Focus yourself on Miguel's part and his role or activities in connection with that school in that integration problem.

A. Okay. I need to back up then, because here we are dealing with young black people who are forced to a setting of hostility, and Miguel has been learning from church, hey, we are meant to be a bridge here. Sacrifice. That means you kind of back down and absorb some of the name calling, overcome your ability to call me names by my ability to absorb that.

That's difficult for young people to understand. Especially young people who are gaining an identity trying to sift what is right and what is wrong and seeing good people shot down. Seeing his own pastor mistreated, abused, life threatened, the church bombed. Our church was firebombed, nearly destroyed in this melee.

Finally, then seeing even resolution of it. I see Miguel seeing that while people talk about what is right and wrong, he doesn't see much of it happening coming at him from society. That what is right and what is wrong. That system and those rules don't necessarily hold when you get out into the real life, and almost put a drift. You have to find

your own way. I saw Miguel from observing him working his way through that problem making some bad mistakes occasionally, constantly working through them.

Q. How often would you see him during this time period?

A. The period I'm describing I would see him just about every Sunday because the period I'm describing is period from eleven years old to about sixteen. And then we run into the problem that I described in the school that he was having. You can understand. Well, you might say if the law isn't that important for the people out there, then all authority figures, teachers create a dilemma in my mind. What is right? He doesn't stick up for what is right, etcetera. That creates confusion ethical dilemma.

I see Miguel immediately falling into a pattern. Now, if I'm going to make it I will have to keep my own world of values to hold on to, what I am and to be somebody. You could just see the thing unfold. It's very dangerous, could be very creative, but a very dangerous thing unless you know really what is happening, because in this type of a situation you can be used by outside forces, forced into channels and ways that you need not necessarily have wanted to go in the first place.

Q. Pastor, let me ask you this. In the earlier days was Miguel a well behaved child?

A. As normally well behaved as any of my others. Yes. Part of the youth group, the support group of the church. He played a role an acrolyte in the church, communion. Sometimes not wanting to go to church like some kids do, etcetera, but he was there.

Q. Was his father a strict disciplinarian?

A. Yes.

Q. Did you have occasion to visit in the home?

A. Yes, often.

Q. Okay.

A. They meant the best for their children. The family from which Miguel comes is a well put together family, very strong father image. A mother who tried to do the best for their children. Middle class you might call them, hard working. He's at Tinker Air Force Base. The mother a homemaker and now working for a National Transportation Company.

Miguel's Mother is a National church leader in the Lutheran church. She represents now the National A.B.L.C. on immigration service. She has been to Taiwan and seen suffering and pain in the world, and brings back those feelings into the homes, so they are sensitivity to raw, human need and injustice out there.

She has been a leading figure in the role of women in the church, played National leadership roles, spoken to National assemblies. She is real articulate and well done, has enabled people to cop with that part of their lives that would have been oppressed. That is the family out of which they emerge.

Q. Let me ask you this. Here in the late 60s, 1970 in Oklahoma City, this racial conflict. How did that effect Miguel's behavior?

A. I think I indicated that creates confusion in young people's minds. They see the law saying one thing and they see people's faces on television representing community

and the people saying other things disrupting the respect for love, what they do with "society's rules".

Q. Did you see Miguel at that time becoming aggressive, tending towards violence; did you see that?

A. No. He was not tending towards violence, but he had begun to question the values of "society" and as I tried to indicate for better or for worse in his own mind determining that for my own survival that he would set out to create a world of his own in which he could survive, in which he could be somebody, his own man, cope with the ambivalence that is out there.

I know for sure this was going through his mind, all this was in the mind of his peers. Miguel is not the best person to be able to share his feelings. He's kind of closed. This doesn't mean a lot of stuff isn't happening, inside. He knows what is happening out there, and I could understand what happens in young people's minds when confusion now occurs.

Here is good guys trying to do what is right and they get put down, you know. Then he sees other people in society obviously doing wrong who have respectable positions, and get by with it. How do you deal with this kind of life into which now young people have to survive? I'm trying to describe a feeling that I perceived Miguel struggling with. That's the word that I want to use.

Q. Now, wasn't his last year of high school that he -- I think he left home, dropped out of school?

A. It would have been his last year in high school. He had gone to three of them. Remember, we are in the black-white thing right now. The first high school that he went to I think only twelve of the black community went, so

that's the eastern part of the city, Dale City. There you had in the beginning of desegregation and in desegregation certain authority figures that didn't like what was happening would communicate that either explicitly or implicitly to some of the black students in the class.

Q. Now, did Miguel --

A. Miguel was in that class.

Q. Did he do this with his fellow students or with the teachers?

A. Primarily with the teachers. He was able to make it with his peer group in this particular setting. They liked him. At other times when authority figures though put him down publicly in class, called names, innuendos, the anger begins to rise up.

Q. You know his younger sister, Paquita?

A. Yes. Oh, yes.

Q. Paquita, was she better accepted by her fellow students or teachers or do you know?

A. I think by that time Paquita was in a different setting, but well accepted by her peers and was able to cope better with the teachers. She may have had a different set of teachers because it only takes one bad teacher to set off a whole set of feelings, both against an institution and maybe against even black people.

Q. Sometime shortly after leaving home, dropping out of school, Miguel gets in trouble and goes to prison.

A. Right. I'm familiar with the incident.

Q. You are familiar with that incident. It involved a welfare check I think?

A. That's right.

Q. You continued to correspond and communicate with Miguel Richardson?

A. Yes. We had exchanges of letters and continued to keep him on the mailing list. I received several communications from Miguel and noticed a change of attitude and understanding, maybe about how you cope with the evil that is in the world. The gospel itself reminds us the way you deal with it. It is overcome evil with good. That's a difficult thing to understand which coasts one on across to perform, which young people have such a difficult time absorbing because it seems awkward.

Miguel was beginning to understand and pickup. I sensed that in the way he responded to what he saw as my ministry in the community, which is very risky because my life was on the line constantly and, I sensed Miguel had a certain respect. Hey, if that white man can do it, why --he was beginning to understand more, and I sensed that from the correspondence, and he never did before. It's a growth pattern that I began to observe a glimmer of light. Hey, maybe this is the beginning of a radical understanding of what our life is meant to be as God's people in the world, and in encouraged him to hang in there.

Q. Pastor, when is the last time before coming to San Antonio that you personally saw Miguel Richardson?

A. This would have been at the communion table, November of 1978. This would have been at a time when the whole Richardson family were involved, too in doing a specific family project for the parrish. This had to do with

debt reduction eliminating some Thirty Thousand Dollars of debt so we could be debt free and become a self supporting parrish.

Up until this time we had been receiving support and the Richardson family very creatively presented a kind of entertainment fashion show which Miguel was the master of ceremonies. He did a really neat job. The parishioners were present at this little fashion show and they thoroughly enjoyed the presentation. I still remember Miguel's words, and it kind of rung a bell with me because he was encouraging them to see themselves in their best light which had to do finally with self image, how you see yourself. That told me, hey, Miguel is still struggling with this one and he's finally going to come clean with it so he can be sure of who he is, so that events and what people think out there wouldn't get hold and control him and what he did and his behavior.

Q. In connection with this fashion show and other times that you have had occasion to observe Miguel, tell us, if you would, your observations of his relationship with women of his own age?

A. In the initial period from the confirmation period class time, adolescence, growing up period as he went into high school he had a personality in a way of dealing with people that was open and attractive. And he is a good looking lad and girls found him attractive and were attracted to him. I have evidence that they would even come from long distances. A little girl in Colorado who really took his side, friended him, understood the struggle he was going through and came all the way to Oklahoma City and taken into the Richardson home. And befriended by the parrish, etcetera, but it was also interesting at the fashion show that some of the young girls in the community were there strangers to me but they were there obviously because, hey, Miguel was here.

They were drawn to him. They were fascinated, attracted to him. You will have to ask the girls that question, but they were there.

Q. Have you continued to correspond with Miguel up to the present time?

A. He has been receiving communications. Yes, from me up until this time. That's right.

Q. Okay.

A. At least the church mail. This is what I'm saying right now. I have not been able to individually send personal things as much as I would like to.

Q. When he was in jail in Denver did you write back and forth?

A. We wrote not a lot, but he wrote and we answered, yes.

Q. In the course of you knowing Miguel Richardson when he was growing up in your church and later on, did you become familiar with his talents as an artist?

A. Yes. The whole Richardson family has artists in the family, and I was really amazed and also pleasurably surprised. We have an annual art festival at the parrish. He would send back some of his drawings which had to do with particularly religion, Christian art.

I was particularly interested in some of the things he was beginning to pickup and how he was beginning to express himself in this. As I indicated verbally, Miguel has struggled to articulate well with words. He's learning that. His poetry that I have in my hand and stuff that he sends

indicates that a growing ability to express feelings and words, that he finds it difficult to express to people in conversation, etcetera. Art becomes the vehicle of expression of crystallizing inside yourself what is happening inside as you understand what is going on.

Q. Generally what is the theme of this art work?

A. I was particularly interested in the way he handles crucifix themes, suffering, pain, and how he has learned that the God that we own and that we love is able to cope and deal with pain. That is the hard lesson that came out of the 60's, the whole movement.

I began to see he was beginning to learn the way to deal with that mess out in the world. It is not just to turn your back on it or to take a drug trip and run from it, but to move back into it and spend something of yourself dealing with it, carrying for it, redeeming it.

This is the way I was interpreting the art, and I think some of our conversation with the mother when she brought the pieces for display indicated that and entered in some of the themes he was picking up.

Q. Let me go back to this earlier days when he was in your school there. Did you bring a photograph with you?

A. Yeah, I did. I wanted to see the peer group that was in that group and this is the group that he grew up in. This goes back to 68,69.

MR. CAZIER: I'll ask the Court Reporter to mark this.

WHEREUPON, at this time, Defendant's Exhibit DD is marked for identification purposes.

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. Let me hand you what the Court reporter has marked as Defendant's Exhibit DD and ask you if this is a photograph of that first communion class back in 68?

A. This is 68, yes, sir. The whole class.

Q. Does it fairly and accurately represent a picture of the students and yourself there inside the church?

A. Yes, It does.

Q. All right. And as is Miguel pictured there?

A. Miguel is the central figure in the front.

MR. CAZIER: We offer Defendant's Exhibit DD, Your Honor, and tender the same to counsel.

MR. BURRIS: Your Honor, this is no more relevant than the picture of the deceased, Mr. John Ebbert that I tried to introduce into evidence. I'm going to object to it on grounds of relevancy.

THE COURT: Overruled. Defendant's Exhibit DD will be received into evidence.

WHEREUPON at this time, Defendant's Exhibit DD was admitted into evidence.

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. Now, that is Miguel Richardson, the young man in the middle on the front row there with the smile on his face?

A. Yes. Right in the center.

Q. Who are some of the other students there?

A. Laura Jones, my daughter, Jody. That's Karen. She's now in Germany. Her husband -- I mean her father is a service man. Fal Jones, Julio, his brother. That's Leonardo Green, Donald Green, Leonardo Smith. That's my other daughter Lynn. Lynella. These two are the Miller sisters. Shella and Carroll.

Q. Now, some of these former students have done well and some have done very badly, have they not?

A. That's right.

Q. One of the former students pictured here became involved in drugs and is now dead?

A. He was murdered by the drug ring for using it.

Q. Another is an educator?

A. That's right.

Q. So they have gone to both extremes?

A. There was a nurse, both extremes coming out of this melee. This is why I was reflecting as I viewed the parrish records. The kids that came out of this peer group I was trying to ask myself a question why forty percent

seemingly dropped out, washed by the wayside, became effective in society or trying to rebuild their lives.

The only answers that I have is the confusion of that era in which they saw a whole society just rip a part, what was right and finding themselves in a fog out there trying to find their way, and fortunately some come clean with the answer, finally, and discover what it was all about, why we were in their struggling, why the parents were in there struggling, and I'm seeing that turn around in some of the stories, even as I could tell their life story here, everyone of those to be black and in a predominantly white community is a struggle in itself.

And then to be a parrish that is applying this kind of key role is in itself a struggle. And yet the city has held up. Redemer Lutheran Church is one of the most constructive communities in the whole city. The Mayor, who has been there ten years has said this publicly, even after we are firebombed, the city came to my rescue, guarded my life constantly when I was threatened and just growing up in that kind of an atmosphere you can understand what this does. What am I going to do with my life out there.

Q. Do you have another poem there of Mr. Richardson's?

A. This would illustrate I think, and I said Miguel was poor in words. The guy has grown fantastically in articulating. What I have been saying, and what now he is seeing and committed himself to over the past two years. I have seen the change, the way to cope with that mess out there is to care. Martin Luther King once said, "I'll deal with your ability to mess me up with my ability to absorb it, to take it and still care about what happens to the world out there" and that takes guts. That takes a deep, commitment. That

takes some savvy, some understanding and recognition, and what that cross story was all about. It's the kind of world we are in. I would like to read just some of it just to let you see what the sounds were.

Q. As I was telling Miguel, the poem is already in evidence and we are not permitted to read something that is already in evidence.

A. It's fantastic as he spells out what's out there and comes up finally with the answer. It's a suffering God that is able to cope with that and that finally makes us triumphant and sets us free with having to be defensive. It sets us free from having to be vengeful. That sets us free maybe for doing some good in society, spending ourselves, expending ourselves, once again picking up hurting people and helping. That is the direction in which I have seen this whole pattern go.

I believe Miguel. I trust him, and I know as much as this jury does, and I know as much as the audience does, the circumstances unhappily have impacted his life when he got involved in -- even after seeing that, I as pastor fifteen years knowing him and the pain of people and the troubles of life out there I believe him.

MR. CAZIER: Thank you. Pass the witness, Your Honor.

* * * * *

THE COURT: Any cross-examination?

CROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Reverend.

A. Yes, sir.

Q. What is all of the information that you

I would have mixed feelings about whether the Death Penalty itself deters crime. I myself and the statistics that I see and what I see in the community it does not, but I do see and I have ministered in El Reno Prison, ministry where you have outside people who care who come in and do something meaningful. Lifes get changed and you have a chain of events happening inside prison walls that create prison ministry that can only be positive, constructive good that I can verify from testimony and years and years of pastoral experience, and I would bet my life on it.

Q. Would you bet everybody else's life on it?

A. I don't know whether I would buy into that one. I have no comment. I would bet my life on it. I can't make that decision for you.

Q. You tell us, Reverend, that the prison setting develops a community ministry and that here over the last two and a half or three years you have seen the changes come over Miguel Richardson; is that correct?

A. I would say that I have seen pieces of light and evidence that Miguel is understanding things that he never adequately understood before. Yes, and that this was producing changes in his own mind, wanting to develop a kind of a macho image of his own for himself. He couldn't get it any other way. This way maybe. I have never seen him, though this is a normal pattern of, if I'm blocked here, then maybe here because he saw that it worked elsewhere. He saw other people surviving that way.

Those ever are the problems that I was referring to, the mistakes, lining up wrong relationships, thinking that they were going to be a solution where in fact they were going to be a dead-end. We could stand by only in pain to see this happen and hope that in the process Miguel would discover for himself really the see secret of what does it mean to be a man, and I'm convinced that he's very close to that right now.

MR. BURRIS: I don't believe I have any more questions.

MR. CAZIER: No further questions.

THE COURT: You are excused, sir. Thank you very much.

* * * * *

MR. CAZIER: We have one more very short witness.

THE COURT: Call him, quickly.

MR. CAZIER: Wayne Bernard.

THE COURT: Be sworn, please.

WHEREUPON,

WAYNE BERNARD

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

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DIRECT EXAMINATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, sir?

A. Wayne Bernard.

Q. What is your business or profession?

A. I'm minister of the Randolph Church of Christ in Universal City.

Q. How long have you held that position?

A. Approximately a year and a half.

Q. What are your educational qualifications or experiences to hold that position?

A. I have B.A. from Abilene Christian University. I'm presently working on a specialist Masters Degree in marriage and family therapy.

Q. Do you know Miguel Richardson?

A. I do.

Q. How long have you known him?

A. For approximately six months.

Q. Since March of this year. How often have you seen him?

A. I see Miguel at least once a week within the jail. I serve as a volunteer chaplain volunteering about twenty hours a week.

Q. Where in the jail do you see him?

A. Primarily in the chapel area itself, but also on his floor.

Q. Okay. What you do when the two of you are visiting together?

A. I hold a bible study and a service for the special management group every Friday, and ordinarily there are four to five men who come, but on special occasions, special to me, Miguel was the only one, and we are able to share privately in the study of God's word.

Miguel has been interested in the word of God and we have been studying for seven months and it's more than just a visiting situation. Miguel asks questions and I answer them. He takes notes. It's obvious to me that he is very diligent in his study.

Q. Have you observed in the seven months that you have known him any change in his attitude?

A. Yes, I have.

Q. What have you observed?

A. When I first met Miguel in May I had no idea why he was in jail. I don't usually try to find out. We began studying the word. He had a lot of very specific questions about churches and about the Lord and about salvation. It was obvious to me he had already been doing a lot of thinking along that line.

We began studying, and then in May he was baptized within the jail. I think from that point especially forward I could see a real conversion within Miguel, and I think that is

evidenced by the fact that I have never seen any acts of violence, verbal or physical from him in the seven months I have known him. Six months.

Q. Did he participate in a course of Bible study, formal course that you offer?

A. Yes, he did.

Q. Is that a correspondence course?

A. Yes. They are. We have several correspondence courses that are offered to inmates and prisoners in the Texas Department of Corrections, and Miguel has taken part in those.

Q. Has he brought other fellow inmates into your religious activities?

A. Yes, he has.

Q. Okay.

A. Various ones who have acted disinterested in the past became more interested, and I think one of the specific reasons is because of Miguel's influence. He was in isolation, so he didn't have that much activity with them except at recreation and then at the services that I offered on Fridays.

Q. Do you feel that you know him well enough to know whether or not this is a part, a fake activity on his part calculated only to get someone like you to bring into Court to testify?

A. Yes, I do. Miguel and I shared very private times from, I feel. I've known of his past. He's opened up

more in the past six or seven months to me than he has in the past. I believe that it would be very difficult to fake a Christianity such as what I have experienced with Miguel. I know a for a fact that that is done.

I feel like I'm a pretty good judge of character for that because I have several inmates who have been paroled or probated who live in my home with me and with other members members of my congregation. I have seen behind the bars, so to speak, and people were for it, but I feel like what Miguel has experienced and what he exhibits in his life is sincere.

MR. CAZIER: Mark these

WHEREUPON, at this time, Defendant's Exhibits EE,FF,GG were marked for identification purposes.

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. Are you familiar with Miguel's art work?

A. Yes. I am.

Q. I hand what you the Court Reporter marked GG, FF and EE and ask you if you can recognize these exhibits?

A. Yes, I can.

Q. And what is that?

A. Those are pictures. Three among several that I know of that Miguel has drawn himself.

MR. CAZIER: We'll offer defense exhibits EE, FF and GG, Your Honor.

MR. BURRIS: I have no objection.

THE COURT: Defendant's Exhibit EE, FF and GG will be received into evidence.

WHEREUPON at this time, Defendant's Exhibits EE,FF & GG were admitted into evidence.

MR. CAZIER: Pass the witness.

THE COURT: Any cross-examination?

MR. BURRIS: Yes, Your Honor.

CROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Mr. Bernard, when was it you said that you first encountered this person right here?

A. Toward the end of May.

Q. And you have noted marked changes in his the objections and motions filed, all of those things that Mr. Ebbert did not receive the benefit of.

Mr. Powers did not receive the Death Penalty. Forgive me just one more time, and the Defendant brings forward in his defense the Bible. And I have no criticism of those people that testified for the Defendant, but they were here for one purpose. They were here for Miguel Richardson.

You have a broader scope ahead of you. You are not here for Miguel Richardson. You are here for your entire community.

Miguel Richardson is a user. He has used people in the past. He will use them in the future to his own personal well being. He is a manipulator.

Let's think about the times that Miguel Richardson has discovered God for his benefit. All right. Miguel Richardson gets sentenced to a special sentence under the Federal Youth Corrections Act which gives special provision for their rehabilitation for Federal check theft. They can get an early parole, if they are of good conduct. Did Miguel Richardson get early parole? No, but during that course of time Miguel exception when it relates to the breach of the duty. And it really, the Supreme Court has said, is only relevant to this narrow issue of if you are going to say that counsel was deficient for failing to investigate something, then you have got to find out whether he had with respect to that investigation any basis from his client to investigate.

However, what we're saying is quite the opposite. He was justified in not eliciting evidence that would have been used by Dr. Death to send our client to death, to get the client the death penalty.

MR. SHAUGHNESSY: Your Honor, could I point out page 110 of the Writ of Habeas Corpus where it states: Mr. Richardson was denied effective assistance of counsel during both phases of his trial. That, to me, is a claim that Mr. Cazier was ineffective both regarding the guilt-innocence question and the punishment phase.

I might also point out on page 111 it says: Foremost among the deficiencies was counsel's failure to properly investigate and secure the testimony of certain witnesses.

Now, it's the State's position that the decision whether to investigate those witnesses and to secure and present their testimony cannot be

DEFENSE EVIDENCE ON PUNISHMENT

MR. CAZIER: I'll call Doctor Lee Griswold.

THE COURT: Would you be sworn please, sir.

WHEREUPON,

LEE GRISWOLD, M.D.

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

* * * * *

DIRECT EXAMINATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, sir?

A. Excuse me. Lee Griswold. G-R-I-S-W-O-L-D.

Q. What is your business or profession?

A. I'm an optometrist, have been all my life.

Q. Are you continuing in the active practice of optometry at the present time?

A. Yes. I go to my office half a day every week.

Q. So, you are semi retired, are you?

A. Yeah.

Q. Are you a lay minister of some religion or faith, Doctor Griswold?

A. Yes. I'm a lay minister. I'm a lay minister in the Episcopal church, but no one understands that, so I say I'm a lay minister.

Q. Very well. Where are you from?

A. From Denver, Colorado.

Q. Do you know Miguel A. Richardson?

A. Yes. I was looking for him. I couldn't see him until you pointed him out, although I know him very well.

Q. How long have you known him?

A. Well, it's been almost two years.

Q. How did you come to know Miguel Richardson?

A. Because I have been visiting at the Denver County Jail every week except this week and one other week for about four and a half years.

Q. All right.

A. And the reason I met him was that someone suggested or asked him if he would like to be called down to visit with a fellow. He hasn't known me. I hadn't seen him before either, but that is the way I have been doing this visitation work as I call it, because I was called out there, it

was suggested that I go there four and a half years ago after my wife met this woman in the grocery store who looked so bad that my wife asked her what was wrong, and she said her son was in the Denver County Jail and no one would go see him. And she couldn't go.

She asked my wife if she could pray for him. She said, "Yes, and maybe we can do more than that". When she came home she said, "Have you ever been in jail?" I said, "No". She said, "I think you should go out and see this boy", and I did.

Q. And you have been visiting ever since?

A. I have been there every week since.

Q. Miguel was in the Denver County Jail for about twenty-three months, wasn't he?

A. I don't know for sure. I've heard that it was twenty-three months.

Q. How long did you actually know him?

A. Well, I've known him now for over a year and a half or around a year and half, and he has been here five or six of those months in San Antonio.

Q. Well, did you know him for a year and a half in Denver?

A. Yeah.

Q. A year and a half in Denver?

A. Yes.

Q. How often would you see him?

A. I would see him every week if it was possible, and there were certain times when the officials didn't let me see him.

Q. They wouldn't let you see him on some occasions?

A. Well, for some reason or another they said he wouldn't be able to see me.

Q. Okay. Where was he when you first met him, what unit was he in?

A. It could be, and I don' remember all of these details like I should. It could have been that he was in building six, but it was shortly after that in the segregation unit which is commonly called the hole.

Q. All right.

A. And that is where I where I spoke to him most of the time, because he was there most of the time that I visited with him.

Q. What was the subject matter of your conversations with Mr. Richardson?

A. Well, you see, as a lay minister I have been warned by all of the administration officials, "Now, you are here for only one thing and you don't try to do anything about their legal status and you don't bring anything in here and you don't take anything out of here and all the rules that go with visitation".

And of course in my work it's to do spiritual counseling you might call it because I was given a social agency pass to go in to use the counseling rooms.

Q. And did you use the counseling room for purposes of religious discussions?

A. Yes, sir. Religious discussions, and there is one thing I would like to say right now, if it's permissible.

Q. Well, what is that, sir?

A. One of the times that I was talking to Miguel, and we called him a different name there, and it's hard for me to say Miguel.

Q. You used to call him Silky?

A. We used to call him Silky.

Q. Everybody called him that?

A. All right. When I met his parents there, when they came to visit him one time, and it was just before that that I had been talking with him in the counseling room, and we were discussing things because the man that was in the hole with him had brought him to a point where he could understand some of the things that any spiritual counselor would say, and I said, "Well, Silky, you understand that there is eternal life for all of us through our Lord Jesus Christ and it's either you end up there or down there. You are either saved or you are lost".

And I was visiting with another young man. They don't call them boys in these institutions, and I was brought to ask about that, so I'm visiting with the men or the fellows out there. And he said he waited until this other

fellow -- I was through visiting with him, and he came back in and he says, "I don't want to be lost. I want to be saved".

We started talking again and from then on our conversation took on a deeper meaning for both of us, and I really feel that I've gained probably as much as Silky has and more maybe.

Q. In the course of your visits there for over a year and a half period, have you observed a change in Miguel Richardson?

A. Oh, yes. It's been marked. The administration even knows the difference, and it happened because Silky started to pass on what he had learned when the first man was taken to California.

And this first man is back already, and I would say well on the way to being a substantial citizen, and so Silky started talking with another man in the segregation unit, and he brought him along, and so I was talking to both of them.

Q. All right.

A. His name was Brittle, commonly called Cosmo, and both of these fellows showed a marked difference in their reactions, and the administration couldn't believe it.

Q. Let me ask you this, Doctor Griswold. Since Miguel left Denver and has come down here to San Antonio, have you continued to correspond with him?

A. Oh, yes. We have corresponded and some of the letters that he has written to me have continued to reveal the changes that have taken place in his life. This is just one thing that I would like to say. When I started visiting there it

was only the third or fourth time and understand I only visited with the ones who were you might say referred to me by the fellow on the tear. They would say would you talk to the fellow in the next cell to me, next house. They use the expression house.

And they say, "Well, he's only fifteen" and I can't read or write but he would like to talk to you. Well, certainly I would like to talk to him. We gave them a bible and I wanted to bring one of those Good News Bibles here when I was called and I didn't know I was going to be called this early.

This is a version that puts the gospel story in a very simple way so that the men can understand it better than they ever have before, and this young fellow couldn't read.

Q. I want you to talk about Miguel Richardson.

A. There was one who could read, and he came through the message of the word of God, which is what we call the scriptures. He came to a very deep understanding of what the christian life is about.

Q. Was Miguel --

A. He began to practice that in the hole.

Q. Was he reading to this younger prisoner?

A. Yes. They read together. They studied together. Cosmo told me, and he was still there after Silky had been brought back to Texas, and he told me about the things that had happened during the time they were in the hole together.

Q. Okay. I don't want you to repeat anything that Cosmo may have told you. Have you had occasion to send one of these bibles to Miguel since he has come down here to San Antonio?

A. Yes, because he wrote to me and said they wouldn't let him bring the bible with him, and could I send him another one. Well, through our group we were able to do that, and very happy to do that, and as far as I know he still uses that same bible.

Q. Thank you, doctor, very much.

MR. CAZIER: We Pass the witness.

* * * * *

CROSS EXAMINATION

THE COURT: Cross-examination.

MR. BURRIS: Yes.

CROSS EXAMINATION

And we had a good time. It was nice.

Q. What type of personality does Miguel have?

A. Very pleasant and just real jolly. You know, he wants to know what is going on around him.

Q. Have you ever observed him to be a violent individual?

A. Not at all. No.

Q. Have you ever observed him to be mean or vicious towards other people?

A. Never.

Q. Have you observed on the contrary that he exhibits warmth and feeling towards other people that he meets?

A. He sure does, because there is a little girl that I know that he has done just that and he hasn't ever face to face met her but he has done so much for her.

Q. Tell the folks on the jury about that little girl.

A. Her name is Karen Cracken. She's fourteen years old, and she's got a lot of health problems as well as family problems. She's an adopted child into a family that the mother is basically an alcoholic, and through me she met Miguel through letters. They have corresponded ever since he has talked to her on the phone when he was allowed phone calls from the county jail in Denver. He has talked to her.

They analyzed her as kind of a suicidal child at that time until he had talked to her and it just completely changed her personality. She's a different person now. He has given her a different aspect of life, somehow, you know, with the things he has written. He has written her poetry. They draw pictures, they send pictures of themselves back and forth, and it's such a change in her that it's unbelievable because she's still staying with me, you know.

Q. How old was Karen when she first became acquainted with Miguel?

A. Thirteen.

Q. They have never met face to face?

A. Never.

Q. They exchanged letters regularly and talked to each other on the telephone?

A. For hours at a time, sometimes for however long he was allowed to talk.

Q. After he came down here to San Antonio have they continued to correspond?

A. Yes. She's written him letters.

Q. As a matter of fact has he called her?

A. Yes, he did. The first phone call I believe that he was allowed to have he called her and talked to her totally and it was real good for her.

Q. What is the nature of that little girl's health problems?

A. She has something wrong with her bones. She has rheumatic fever and some kind of disease in her bones. You know that they are kind of distorted and her feet and things, and it's real hard for a kid at her age to deal with her peers. You know, the tease, the harassment. He's gotten her over that whole thing, you know, just by the way he is, you know.

Q. You mentioned something about his art work. Do you have any background in art?

A. Yes, I do. My mother is a professional artist. She goes to the Academy of Arts, and she has taught me

everything that I know and bragging on me, I'm very good at it. And I've done it for a long time. He is terrific, a great artist.

Q. Has he ever had any professional training in art?

THE COURT: Call your next witness.

MR. CAZIER: Herbert Holston.

THE COURT: Would you be sworn

WHEREUPON,

HERBERT HOLSTON

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

* * * * *

THE COURT: Be seated.

DIRECT EXAMINATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, sir?

A. Herbert Holston.

Q. What is your business or profession, Mr. Holston?

A. Minister and primarily administrator and part-time teaching, on and off.

Q. Tell the folks on the jury your educational background, if you would.

A. My former educational background includes Bachelor's Degree in sociology with a minor in education and also a Masters Degree.

Q. Where did you obtain your education?

A. My Bachelor's Degree was Moore House in Atlanta, Georgia. The Master's Degree was obtained from Fisk in Nashville, Tennessee.

Q. All right. Are you an ordained minister?

A. I'm a licensed minister.

Q. Which church?

A. Mount Zion First Baptist Church.

Q. All right. In connection with your ministry have you come to know Miguel Richardson?

A. Yes.

Q. Did you meet him here at the jail in San Antonio?

A. Yes, sir.

Q. How did you come to meet him?

A. As I recall one of ministers who was involved in the prison ministry indicated to me that there was a young

man that had requested counseling from a minister, and he gave me the name and I came up one day. I don't remember the exact circumstance, but I came over one day as a result of that to speak with him.

Q. Was that about the start of the summer of this year; do you recall when did you first meet Miguel?

A. As I recall it was in July of this year.

Q. Okay. And since that time have you seen him on a regular basis?

A. I've seen him at least four times, maybe four or five times.

Q. Okay. And what are the nature of your visits with Mr. Richardson?

A. To be of whatever assistance I can to him or any other person in jail for that matter, in relationship to this spiritual being, his physical being, his psychological being.

Q. Okay. Are the nature of your visits and discussions primarily religious?

A. Yes, sir.

Q. Do you study the Bible together?

A. Yes, sir.

Q. Is Miguel knowledgeable on the bible?

A. I would say that he has a good grasp for many of the major concepts of the bible.

Q. Is he familiar with many of the passages of the bible?

A. Yes, sir.

Q. And able to go to them and read them at will and easily and locate things that he wants to read in the bible quickly?

A. Yes, sir.

Q. Did you have occasion to make a gift of a bible to Miguel?

A. Yes, sir.

Q. Okay. And did you have his name inscribed on the front of the bible?

A. Yes, sir.

Q. And did you further have inscribed on the front of the bible the inscription, "Reverend Miguel A. Richardson"?

A. Yes, sir.

Q. What was your reason for doing tat, Reverend Holston?

A. I did that primarily for my belief that Miguel Richardson has made attempts to bring other persons to Christ. I did not inquire of anyone regarding any formal kind of ordained or licensing, but that is the reason I did it.

Q. Of course the other people are fellow inmates here in the jail?

A. Yes, sir.

Q. That he has influenced in a regular way?

A. I believe that to be true.

Q. Now, have you ever had occasion to discuss with him the nature of the charges against him here in this Court?

A. Well, there was always an opportunity for that. Yes, sir.

Q. Did you ever discuss it?

A. Not in detail. No.

Q. Okay. In fact, I think you told me that you first came to know what he was charged with by reading about it in the newspaper?

A. By a spot announcement on the car.

Q. Okay.

A. Car radio.

MR. CAZIER: Pass the witness, Your Honor.

* * * * *

CROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. BURIS:

Q. Reverend, of course your education towards the ministry, did you major in psychology?

A. No. Not as a major, no.

Q. Was that a minor?

(WHEREUPON, at this time, the Witness was excused.)

* * * * * *

THE COURT: Call your next witness.

MR. LANE: Your Honor, Petitioner calls Allen Cazier.

* * * * * *

WHEREUPON,

ALLEN CAZIER,

The witness, after having first been cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

* * * * * *

DIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MR. LANE:

* * * * * *

Q. Would you please state your name and address for the record?

A. My name is Allen Cazier. My address is 415 Country Wood, San Antonio.

Q. Sir, you are an attorney admitted to the practice of law?

A. Yes, sir.

Q. And when were you admitted?

A. September, 1972.

Q. And where did you attend law school?

A. St. Mary's University.

Q. Do you have a principal area of practice?

A. Criminal law.

Q. Are you Board Certified in any area?

A. In criminal law. Yes, sir.

Q. Could you just describe briefly your employment background from 1927 forward to 1981, approximately?

A. I graduated --

Q. Over the representation of the Defendant.

A. I graduated from law school in May or June of '72, and I served as the Court coordinator for the 144th District Court here in Bexar County for one year. And I went into private practice exactly 24 years ago today. I have been in private practice since that time.

Q. And you said you were the Court coordinator for a Court. Which Court was it?

A. That was the 144th District Court. The Judge's name was Archie Brown. It was a Court that handled only felony criminal cases.

Q. How did you come to serve as counsel for Miguel Richardson?

A. I was appointed by Judge Preston Dial in May of 1981.

Q. Was Mr. Richardson already represented by counsel at the time?

A. He was. He was represented by Clarence Williams, who had been appointed earlier.

Q. Did you both serve as counsel throughout the trial of the case?

A. We did.

Q. Had you previously served as counsel in a case in which the State was seeking the death penalty?

A. Yes, sir.

Q. On how many occasions had you participated in such a case?

A. I had represented two other persons charged with capital murder. One was settled through a plea bargain; one was tried to a jury.

Q. Had you been involved in one at the appellate level, too?

A. Not at that time. It came after 1981. As I recall. I may be wrong about that.

Q. When you were appointed as counsel, when did you first learn of the circumstances of Mr. Richardson's alleged crime?

A. When did I first learn of the circumstances?

Q. When did you first learn of the circumstances of that alleged crime?

A. I think I probably first learned of the circumstances from Mr. Williams, who had been in the case for a couple of months before I was appointed.

Q. Had the crime been reported in the press when it occurred?

A. Yes.

Q. Was it, in fact, a notorious crime?

A. It was well publicized.

Q. And were the circumstances in that case such that if the Defendant was convicted, he would have faced a serious threat of the death sentence?

A. I considered it to be such. Yes, sir.

Q. What did you know of Judge Dial when you learned that the case would be in his Court?

A. Well, I had known Judge Dial since 1972. He was a District Judge at the time I was employed here at the courthouse. And I had handled a number of cases in his

Court. I didn't have a personal relationship with Judge Dial outside the courthouse, but I had tried cases in his Court and I knew the man. Still do.

Q. I'm sorry?

A. I said I still do.

Q. Okay. After you were appointed, did you come to learn the circumstances of Miguel Richardson's background?

A. Yes.

Q. And you also learned of the evidence that the State was going to present against him; is that right?

A. Well, not completely, because at that time there was no open-file policy, and discovery at that time was not anything like it is today. But I knew something about what the case, the State's case consisted of. I had the witness list, and I had spoken to the prosecutors about the case.

Q. Did you come to meet members of Mr. Richardson's family?

A. Yes.

Q. And do you recall which members you met?

A. Specifically, I remember meeting his mother and his father, his sister, Paquita Richardson, and I remember meeting Julio Richardson.

Q. Now, when you met with the Richardson's, did you first meet with them all together? In other words, did you have separate interviews with Paquita?

A. I would say that the only one I had a separate interview with was Paquita Richardson.

Q. Okay. Do you recall speaking with Julio Richardson?

A. I recall meeting him in the presence of his parents. I really don't recall speaking with him beyond being introduced to him.

Q. Did your interviews with these members of Mr. Richardson's family reveal the presence of learning disabilities in Mr. Richardson's past?

A. No.

Q. Did they reveal to you that he had a history of abuse, physical abuse as a child?

A. No.

Q. Did they reveal that he had a possible history of sexual abuse by his sister, Loleta?

A. No.

Q. Did you actively pursue evidence of child abuse, per se?

A. No.

Q. Did you ever subsequently file a motion with the Court to retain a mental health expert?

A. I don't recall ever having filed such a motion. In fact, I had instructed Mr. Richardson to not talk to any psychologist or mental health person unless I was present. So

I don't believe I filed such a motion. It's possible that Mr. Williams did before I was appointed.

Q. Now, in fact, when you were retained, did you discover that Mr. Richardson had been examined by a psychologist prior to your appointment as counsel?

A. I don't remember if it was before I was appointed. I recall that Dr. Betty Lou Schroeder, who was a psychologist employed by the County, did at some point interview him and had prepared a report.

Q. And what was your response when you learned that she had been examining him?

A. My response was to again instruct Mr. Richardson to not talk with her unless I was present.

Q. Do you recall that the trial of Miguel Richardson was conducted prior to the Supreme Court's decision in Penry versus Lynaugh?

A. It was.

Q. At the conclusion of the guilt phase, if Mr. Richardson was found guilty, you were familiar with the issues that would be submitted to the jury?

A. Yes, I was.

Q. At that time, I just want to read the two issues to you and ask if these were the issues that you understood would be submitted to the jury.

Issue number one: Was the conduct of the Defendant that caused the death committed deliberately and

with a reasonable expectation that the death of the victim would result? And is that accurate?

A. Yes.

Q. Okay. And that the second issue was:

Is there a reasonable probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

A Yes. That was the second issue.

Q. At the penalty phase, you asked the Court to give a number of instructions as well to the jury; is that right?

A. Yes, sir.

Q. Do you recall requesting an instruction which read, and I'm going to read this requested instruction:

You are instructed that you may answer any of the special issues no if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty. Do you recall making that request?

A. Yes, sir.

Q. Did you also request it in several other forms as well?

A. I think there were at least five separate requests along those lines. In other words, requesting instructions having to do with the application of any evidence that the jury might think mitigated against death.

Q. What was your purpose in requesting that instruction?

A. Well, my purpose was to, frankly, to protect the record. We were required to submit requested instructions in writing and to obtain a ruling from the Court prior to the time the charge was read to the jury.

Q. You say to protect the record. Was there any case precedent that established a right to such instruction at that time?

A. No. In fact, precedent was to the contrary.

Q. And you indicated that you were familiar with Judge Dial in his courtroom. Had Judge Dial, to your knowledge, ever given such an instruction?

A. To my knowledge, he had not.

Q. Okay. And to your knowledge, had courts consistently denied an instruction of the type that you had requested to defendants?

A. With one exception that I personally knew of, those instructions had been denied.

Q. Did you believe it was unlikely that Judge Dial would grant your request, Penry type request?

A. Yes. I thought it was unlikely that he would grant those instructions.

Q. And did the case law support your view that obtaining such an instruction was unlikely?

A. I remember that there was one case that was probably in point, and I want to say it was Quinones, that had said additional instructions in addition to the questions would not result in reversible error.

Q. And that was a Court of Criminal Appeals case decided one year before the trial?

A. As I recall it was.

Q. Did you also, were you also familiar with a case of Jurek versus Texas?

A. Yes.

Q. And did that case also indicate to you that there was little likelihood or that there was little support for you getting that instruction?

A. Actually, Jurek is what myself and some of the other members of the defense bar thought supported those instructions. In other words, as we read Jurek, we thought that Jurek supported the giving of some additional instructions to the jury on how the jury might apply mitigating evidence.

Q. And that was decided in 176; is that right?

A. I think so.

Q. And Quinones, one year before your trial, had considered Jurek and decided that it did not require such instruction; is that right? Is that your recollection?

A. I believe that's correct. Yes.

Q. Let me ask you about the practice in those days here in Bexar County and elsewhere. Prior to the Supreme Court's decision in Penry, did the State typically employ expert witnesses at trial during the penalty phase?

A. Yes.

Q. In fact, did the State designate any psychiatrists as experts in Miguel Richardson's case?

A. They did.

Q. Do you recall who it was?

A. Doctor James Grigson from Dallas.

Q. Was Dr. Grigson known among the defense bar?

A. He was very well known to the defense bar in Texas at that time. He testified in many capital murder cases, invariably for the prosecution. He was a particularly effective witness for the State.

Q. Did the defense bar, members of the defense bar refer to him by any other names?

A. He was known as Dr. Death, as I recall.

Q. What did you know of Dr. Grigson's typical testimony in cases in which the State sought the death penalty?

A. Dr. Grigson invariably, whether based upon an examination of the Defendant in question or based upon hypothetical questions, would invariably testify that he diagnosed the individual as having what is known as

antisocial personality conduct disorder. He would go on to testify that that was an incurable condition. And, in other words, testimony in support of the future dangerousness question that was being submitted to the jury.

Q. What did you know the manner in which Dr. Grigson used evidence of child abuse as testimony?

A. As I recall, I had seen Dr. Grigson testify on two occasions. I knew something about his manner of treating cross examination. And it was my belief that he would testify that child abuse was a predisposing factor, or one of the diagnostic criteria for antisocial personality conduct disorder. He called it sociopath or psychopath. He didn't actually use that term, but he would admit that that was the diagnosis under the name.

Q. Was there general awareness among the criminal defense bar at the time that Dr. Grigson took this approach?

A. Yes.

Q. Was it discussed at bar gatherings, legal education seminars and so forth?

A. Yes. And it was covered particularly at the University of Texas Law School where they had a professor there that had paid particular attention to Dr. Grigson and his line of testimony.

Q. Which professor was that?

A. I think his name was Dix. D-I-X.

Q. Based on your belief which you just expressed that you wouldn't receive the proposes instruction that you

wanted and anticipating what the State's expert was likely to say, how did you think the jury would consider evidence of child abuse or physical abuse of the Defendant as a child?

A. I was afraid that that type of evidence would only support Dr. Grigson's diagnosis. And for that reason, we didn't pursue that area. And it was my belief that it would be better to present evidence that would be contrary to the diagnostic criteria, which as I recall, spoke a lot of - there was a requirement under the diagnostic criteria that the diagnosis had to be made based upon conduct that had occurred prior to age 15. And so the evidence that we sought to develop that related to Mr. Richardson's conduct prior to age 15, we hoped to develop evidence that was contrary to the diagnostic criteria.

Q. Okay. What would be the kind of evidence that you sought to develop in that regard?

A. Two-parent family, discipline in the home, religious training, participation in education, extracurricular activities at school, that sort of thing.

Q. Do you recall who presented that evidence during the penalty phase?

A. Do I recall who the witnesses were?

Q. Yes. Who were the witnesses? Well, let me ask you, it's been 16 years. Do you recall that Paquita Richardson provided such evidence?

A. I recall that she provided that type of evidence, and I believe she was the only family member to testify.

Q. Did, in fact, let me ask you something. Did your response to your learning of Betty Lou Schroeder's

examination, was that driven also by what you anticipated Dr. Grigson would do with what she found?

A. I'm not sure if I understand your question, but Dr. Betty Lou Schroeder's diagnosis was, as I recall, the same diagnosis that I anticipated that Dr. Grigson might make. Probably on hypothetical, but it would have supported that diagnosis.

Q. In fact, the State did call a psychiatric expert at trial; did it not?

A. A psychologist.

Q. A psychologist. And was that Dr. Robert Rast?

A. Yes.

Q. All right. Did he use in his testimony the evidence, the report that Betty Lou Schroeder had prepared?

MR. SHAUGHNESSY: Your Honor, the record will reflect what the testimony of Dr. Rast would be. I think that's a better record of what it was rather than the memory of Mr. Cazier.

THE COURT: Sustained.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Is it the case that the only examination of Miguel Richardson by mental health professionals was used by the State to secure the death penalty?

A. Would you ask that question again?

Q. Betty Lou Schroeder was the only individual who examined Mr. Richardson; is that correct?

A. To my knowledge, yes.

Q. Isn't it the case that this being the only examination of Miguel Richardson, that the only examination of him was, in fact, used by the State in order to secure a death penalty against him?

A. To be honest, I don't remember whether or not Dr. Schroeder's report was used in evidence. I honestly don't remember that, or if it was referred to by any witness.

Q. I guess what I'm trying to understand is, is it the case that what you feared would occur, in fact, ultimately did occur with her report, if you developed other evidence in the mental health area?

A. Well, what I recall is that Dr. Rasp did, in response to hypothetical questions, testify that the hypothetical person was a sociopath and incurably so.

Q. Did your knowledge of how the State would typically use evidence of child abuse and mental defect or illness have an impact on the manner in which you prepared for and handled the punishment phase?

A. Yes.

Q. And was - I want to turn to the practical effects. Did you attempt to investigate, prepare or present evidence of mental impairment or child abuse?

A. No.

Q. And that was for the reasons that you testified?

A. Yes.

Q. Did you investigate if there was any available medical and psychiatric evidence concerning Mr. Richardson?

A. No. Not that I recall.

Q. Were you concerned that that might turn up something else that might be used by the State?

A. That was a concern. Yes.

Q. Okay. Mr. Richardson testified yesterday, Julio Richardson, let me make that clear. He testified to a number of things. First of all, you have seen his affidavit that was submitted with the application?

A. Yes, sir.

Q. Were you aware of the circumstances of child abuse that he described in that affidavit at the time of trial?

A. No. I was not.

Q. Was that something that you wanted to - was that evidence that you wanted to develop?

A. No.

Q. Okay. Is it fair to say that you were chilled from developing that evidence because of the possible uses of the evidence?

MR. SHAUGHNESSY: Your Honor, this isn't cross examination. That's a leading question. I object.

THE COURT: Rephrase your question.

MR. LANE: Okay.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q What effect did your anticipated failure to get the instruction and the possible uses of the evidence by the State have on you?

A. Well, in anticipation of the probable testimony of Dr. Grigson, I really didn't want to seek out and find any evidence that would corroborate his hypothetical diagnosis. I didn't ask about child abuse. I didn't go into it. I was interested in just the opposite, frankly.

Q. Now, given that approach based on the realities you were facing, were you aware that, as Julio testified, Julio Richardson testified, that Miguel Richardson as a child was beaten with a hose, a razor strap and a two-by-four?

A. I don't believe I had heard any of those things. No.

Q. Were you aware at the time of the trial that Miguel Richardson's father had held a knife to his neck and threatened him in that manner?

A. No.

Q. Were you aware at the time of trial that Miguel Richardson's father had actually stabbed him in the buttocks with a knife?

A. No.

Q. Were you aware at the time of trial that Miguel Richardson's father had tied him to a pole and beat him until near unconsciousness?

A. I didn't know that.

Q. Now, had you known that the Court would grant your Penry type instruction, would you have approached - and is it fair to say, let me ask you first, that the instruction you requested would now be considered a Penry type instruction?

A . I believe it is. Yes.

Q. Shorthand reference to that. Had you known that the Court would grant your request for a Penry type instruction, would you have approached the penalty phase differently?

A. Yes.

Q. And how so?

A. Well, I would have been - I guess we're talking about hindsight now, but I would have been more conscious about developing evidence of child abuse and/or mental retardation.

Q. Have you handled capital cases since the Miguel Richardson case?

A. Yes.

Q. And based on that experience and based on your being a board certified criminal lawyer, is it your

understanding now that with the Penry instruction, developing evidence of child abuse is something that you would do or should do in defending a capital murder case?

A. I think you would have an obligation to do that. Yes, sir.

Q. And has the right to that kind of instruction changed your approach in those cases? In other words, you testified that you speculated, or that you could speculate that you would have changed. But, in fact, post-Penry, has it, in fact, changed your approach?

A. Well, I would have to answer that hypothetically because I have not prepared to try a capital case since Penry, but it would have changed, it would change the way you would investigate and develop punishment phase evidence. Yes.

Q. And based on your experience as a board certified criminal lawyer, are you aware that it has, in fact, changed the approach of other defense lawyers in preparing for the penalty phase?

A. Yes.

Q. Is it now typical to investigate and develop evidence of mental impairment, mental defect, and child abuse for the penalty phase of a capital case?

A. I believe that that's what lawyers are now conscious of. Yes. I would be.

Q. Mr. Cazier, you are aware that Miguel Richardson is asserting a claim for ineffective assistance of counsel as a ground for relief?

A. Yes, sir.

Q. How would you characterize your feelings about the assertion of that?

MR. SHAUGHNESSY: Objection to relevance, Your Honor.

MR. LANE: Well, it goes to his testimony, what he feels about his testimony. How does that - how do you feel about that assertion at this point, of that ineffective assistance claim?

THE WITNESS: I suppose I resent it. I'm not happy about it.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Have you had an opportunity to review the application for post-conviction writ of habeas corpus?

A. Yes.

Q. Have you specifically had an opportunity to review the section on ineffective assistance of counsel at pages 110 through 120 of the application?

A. Yes.

Q. Do you recall that it contains a number of statements as to what you did or did not do as trial and appellate counsel?

A. Yes.

Q. Was the description accurate of what you did or did not do?

A. I think it's factually accurate. Yes.

Q. Were there any misstatements as to the facts set forth in those pages as to what you did or did not do?

A. No.

Q. Okay. Thank you for coming down here today.

MR. LANE: At this time I'll pass the witness.

MR. SHAUGHNESSY: Your Honor, before we begin on the State's cross examination, I need to take up an issue that arises in this context, and that would be whether or not there is a privilege that exists now between Mr. Richardson, or belonging to Mr. Richardson regarding conversations he had with Mr. Cazier during the course of his representation of Mr. Richardson.

I would point out to the Court that under Rule 503(d)(3) of the Texas Rules of Criminal Evidence, it states there is no privilege under this rule as to a communication relevant to an issue of breach of duty by a lawyer to his client or by the client to the lawyer.

Furthermore, the seminal case from the United States Supreme Court regarding allegations of ineffective assistance of counsel, as I'm sure counsel for the Petitioner is aware, is Strickland versus Washington authored by Justice O'Connor in 1984, in which he states on page 2066 of the Supreme Court Reporter, in short, inquiries into counsel's conversations with the Defendant may be critical to a proper assessment of counsel's investigation decisions just as it may

be critical to a proper assessment of counsel's other litigation decisions.

For this reason, it's the State's position that any conversations between Mr. Cazier and Mr. Richardson, and any conversations between Mr. Williams and Mr. Richardson overheard by Mr. Cazier are not privileged and they are not only relevant, they are critical to a resolution of the question of whether or not Mr. Cazier rendered effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article 9, Section 10 of the Texas Constitution. For that reason, I would like to develop those conversations.

THE COURT: Let's take up that issue after lunch. Be back at 2:00 o'clock. Thank you.

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RECESS

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THE COURT: All right. You may proceed. Mr. Shaughnessy, I think you wanted to clear up something.

MR. SHAUGHNESSY: Well, Your Honor, we were just seeking a ruling regarding the privilege that may or may not exist regarding communications between Mr. Richardson and his attorney, Mr. Cazier, and his then attorney, Mr. Williams.

MR. LANE: Your Honor, as I understand it, Mr. Shaughnessy is suggesting that there is some sort of blanket waiver of all attorney-client, or all privileges associated with any attorney-client communications as a result of the claim of ineffective assistance of counsel. That

simply is not the law. There is no case that requires that. There is no doctrine that requires that. And, in fact, the very language that Mr. Shaughnessy quotes, or the very case that he quotes makes it very clear, and I want to read it because it's very important what the language says:

It says: "Where a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to proper assessment of counsel's other litigation decisions."

Now, what it doesn't say is that there will be no attorney-client privilege as to any communications. It says when you challenge a failure to investigate as unreasonable, conversations relating to that investigation, information that would have led counsel to investigate, would be waived. Just those communications.

Well, as I think we made very clear in our papers and we made very clear during Mr. Cazier's direct testimony, we don't say at all that his failure to pursue this mitigating evidence was -we're not challenging his failure to. There was a very strong justification, and that was the chilling effect of not getting that Penry type instruction that everyone knew he wouldn't get, every other member of the bar knew he wouldn't get, and we're going to find that the D.A.'s office knew he wouldn't get it. And that affected his behavior. And in light of that, that anticipated failure to obtain the instruction, his failure to find, you know, elicit the child abuse evidence, which the 5th Circuit has recognized time and again as such valuable mitigating evidence in a death case, that that failure was not -we're not challenging that failure as

ineffective; therefore, we haven't opened up any privilege on that ground.

There is only one, and I should say also that the Court of Appeals in Texas has made clear that the policy of Texas is to disallow attorneys revelations of client information, to do that only in very limited circumstances that are reasonably necessary to resolve a conflict as a result of this alleged breach of the duty.

Now, in this case, the blanket waiver, which Mr. Shaughnessy seems to be suggesting, is not necessary. It's not reasonably related to what he wants to inquire into. There was only - of all the ineffective claim, there's only one that relates to investigation at all, and that relates to failure to investigate certain exculpatory evidence relating to some women who were staying at the Holiday Inn, and that's set forth in the papers.

So I would just suggest, Your Honor, that if we take it on a question by question basis, when we feel he's inquiring into the privilege, we can assert the privilege and Your Honor can deal with it then, but to say just before the examination we're going to get rid of the attorney-client privilege is overbroad, it's unnecessary, and it's not justified by any case.

THE COURT: All right. Then we'll proceed in that manner. Take one question at a time. Do you have a problem with that?

MR. SHAUGHNESSY: Could I get a clarification, Your Honor? Is every question I ask of Mr. Cazier regarding conversations he had with Mr. Richardson, are we going to have to develop the question of whether that's privileged on a question by question as we go?

THE COURT: I take it that you know what the testimony is going to be and you have a general idea of what the questions are going to be, those posed by Mr. Shaughnessy.

MR. LANE: Well, I have to, frankly, I'll tell you I suspect that he is going to claim that there is no attorney-client privilege and he's going to go on a romp through an otherwise forbidden area; that he knows that should we actually get relief and get a new trial, that then our client, the Petitioner is going to be prejudiced in any retrial because all that attorney-client communication is going to be opened up and be used against him at a subsequent trial. That's why the interest is so important.

But what I'm not asking - I think we all can agree, and I think Mr. Shaughnessy will agree, that any communication between Mr. Richardson and counsel during the course of that relationship for the purpose of the representation, which was the only reason they ever communicated, is privileged. So we know that it's privileged. The question is whether it falls into the exception to the privilege. Not whether it's waived; whether it falls into the exception of the privilege, which applies when there is an alleged breach of the duty of the attorney.

This is not a waiver question. This is an exception to the privilege question. And just because there may be an exception to the privilege for a specific communication, and Your Honor is familiar with those, if you approach counsel in order to try to commit a crime, that's not covered by the privilege. If that's elicited and it gets into the record, that's not a waiver of the privilege. And so waiver of the privilege is sort of a blanket thing.

The ineffective assistance has, there is an exception when it relates to the breach of the duty. And it really, the Supreme Court has said, is only relevant to this narrow issue of if you are going to say that counsel was deficient for failing to investigate something, then you have got to find out whether he had with respect to that investigation any basis from his client to investigate.

However, what we're saying is quite the opposite. He was justified in not eliciting evidence that would have been used by Dr. Death to send our client to death, to get the client the death penalty.

MR. SHAUGHNESSY: Your Honor, could I point out page 110 of the Writ of Habeas Corpus where it states: Mr. Richardson was denied effective assistance of counsel during both phases of his trial. That, to me, is a claim that Mr. Cazier was ineffective both regarding the guilt-innocence question and the punishment phase.

I might also point out on page 111 it says: Foremost among the deficiencies was counsel's failure to properly investigate and secure the testimony of certain witnesses.

Now, it's the State's position that the decision whether to investigate those witnesses and to secure and present their testimony cannot be

Court is prepared.

THE COURT: I'm very much prepared.

MR. ROSENFELD: We'll move on to now another part of the case, which is under Claim 3-C with respect to the pending case on the evidence that could have been presented had a Penry instruction been submitted.

THE COURT: Okay. And you are Maria Keane?

MS. KEANE: Yes, I am.

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WHEREUPON,

JULIO RICHARDSON,

The witness, after having first been cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

* * * * * *

THE COURT: Please be seated. You may proceed.

DIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. Could you state your name and address for the record, please?

A. My name is Julio Richardson. I live at 4025 Northeast 19th Circle. I got a new address now, it's 513 East Rickenbacker, Midwest City.

Q. That's in Oklahoma?

A. Right. Oklahoma.

Q. How old are you, Mr. Richardson?

A. Forty-one.

Q. And what is your relationship to Miguel Richardson?

A. Well, I'm a younger brother.

Q. How much younger are you than Miguel?

A. One year.

Q. Prior to this week, when was the last time you saw your brother Miguel?

A. As far as I can recollect, I think it was a year ago.

Q. And have you corresponded with your brother? Do you write him letters?

A. No. I don't write him.

Q. Do you speak with him on the phone?

A. No.

Q. Did you grow up in the same household as Miguel?

A. Yes, I did.

Q. Where was that?

A. It was at 4025 Northeast 19th Circle.

Q. Can you describe for us the house that you grew up in?

A. Well, I'm not sure how many acres of land. It might have been seven, ten, I'm not sure. But at the time, it was pink and white. We had a gravel road at the time. We had pigs and chickens. And it was four sisters and three of my brothers. And we had two ponds, little ponds, creeks, or whatever they call them.

Q. Can you describe the neighborhood that you lived in? What was that like?

A. Well, my grandmother lived down the street, and we had maybe, at the time, three other neighbors, three or four other neighbors that I can recall, in the same mile radius. And it was really a peaceful neighborhood, because there wasn't anyone around but us.

Q. You mentioned some brothers and sisters. How many brothers and sisters do you have all together?

A. Eight.

Q. There are eight, plus you is nine?

A. Plus me. I have a step-sister.

Q. So, is that ten all together?

A. It would be ten all together, yes. But we didn't grow up with our older step-sister.

Q. Can you give us the names of your brothers and sisters?

A. Well, okay. My step-sister's name is Pearly Mae.

Q. Pearly Mae. Is she the oldest?

A. Yes. But we don't really know her that well. She was before us, before, you know, we came. And I have Loleta -- well, Petillio is first, then Loleta, Thecia, Carmen, Miguel.

Q. Then you?

A. Me, Paquita, and Cortez - Guadilupe and Cortez.

Q. Until what age did you live with Miguel?

A. From when I was born to, I think 16 or 17 years old.

Q. Okay. So that was about 16 years you lived with him?

A. Right.

Q. And during that time, did you spend a lot of time with Miguel as you were growing up?

A. Yes. We were always together. Every day.

Q. Can you tell us about your father? What did he do for a living?

A. Well, he used to work for GX. I think he worked on airplanes then. And then he went to Tinker Field Air Force Base, and he retired from Tinker Field Air Force Base, I think as a journeyman.

Q. And he was at Tinker Field when you were growing up?

A. Right.

Q. Did Miguel and your father get along when Miguel was a child?

MR. SHAUGHNESSY: Objection, speculation, Your Honor.

THE COURT: If he knows, he may answer the question.

THE WITNESS: I don't know what you mean, how did he get along.

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. What was their relationship?

MR. SHAUGHNESSY: Objection, speculation, Your Honor.

MS. KEANE: I'm just asking if he knows.

THE COURT: It's overruled.

THE WITNESS: Well, can I answer that?

MS. KEANE: Yes.

THE WITNESS: Well, I think my father really liked Miguel the most out of, you know, his sons. And I think he wanted Miguel to be just like him. He looked a lot like my father. But he still got whippings like everybody else.

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. Miguel got whippings?

A. Yes.

Q. Okay. Did you witness these whippings?

A. Yes, I did.

Q. How often was Miguel whipped by your father?

A. Sometimes mostly at least twice a week or more.

Q. When you say whipped, can you describe for us a little bit more of what that entailed?

A. Well, what with or how hard?

Q. Start with what.

A. Well, we had belts. Like we had names for them, like the green hornet was a rubber hose or a garden hose. And the Whippoorwill was a hose, I think was used for pumping oil or gas that he got from work, you know. And he had a razor strap, and sometimes if he didn't have anything to whip us with, he would just, when we were cutting wood, he would just cut a switch off a tree.

Q. Was Miguel whipped with each of those things that you just described?

A. Yes.

Q. What did the rubber hoses look like? I know you started to talk about the green garden hose. What about the other hose?

A. Okay. The other hose was - it was like a clear hose, and it was about maybe three inches, three inches around, maybe about that big around. I'm not sure how big around, but - and the reason why we called it the Whippoorwill is because it whistles, you know, like a hose will make that noise, and there is a toy they make like that now.

And the switch would be about any size, really. Sometimes he would, you know, hit you with a two-by-four or anything; his hand, or the back of a knife or just anything.

Q. Did that happen to Miguel as well?

A. Yes.

Q. And how long would each of the whippings by your father to Miguel last?

A. Well, Miguel's whippings would last longer because he would try not to cry. He would say, "I'm going to be a man; I'm not going to cry." And my father would whip him longer than the rest of us.

Q. Do you remember how long, in terms of minutes, that would be?

A. Well, I was real young. I remember that he would whip us and whip him until he would cry. He would whip you until you just felt like you were just going to pass out, or it seemed like he knew right when to quit. You would just pray to God that this would stop. It just seemed like he would just quit right then. So, like I said, it would last up to maybe a minute, a minute and a half, two minutes, maybe sometimes.

Q. And was Miguel injured as a result of those whippings?

A. Well, he sat on pillows a lot from that. And I seen before where he had whelps on his behind and I think he still has three of them still there today from injuries. And there is a lot more injuries, like knife wounds. My father stabbed him one time in the behind with probably a six-inch knife, maybe a half or maybe a fourth of it. And, but there is a lot of times, but I can't remember all of them, because we never went to a doctor for it or anything. He would just do it hisself, take care of it.

Q. Do you remember any specific details of the whippings that Miguel suffered by your father?

A. Yeah. The ones that I remember the most is when my father tied him to a clothesline pole. Miguel had run away from getting a whipping. He didn't want the whippings sometimes, so he would run, and my father would tie him to a pole and whip him. And at that time, my father whipped him until he almost passed out, or passed out, because I remember he got real still. And my father took him down and put ice to his head and cold water to his head.

Q. How old was Miguel at that time?

A The height of how he was on the pole, was probably about eight or nine years old.

Q. What did your father tie Miguel to the clothes pole with, the clothesline with?

A. I don't remember what he tied him with, what it was. I know we had ropes and belts and everything, so --

Q. Do you remember what he whipped him with when he was tied to the clothesline?

A. I think he whipped him with his belt that time. He had it on his waist.

Q. Do you remember any other specific instances of whippings that Miguel received at your father's hands?

A. Well, I remember one time Miguel wanted to wear an afro, because everybody was wearing an afro, and he was wanting to wear one. And my dad was making him cut his hair. And he said he didn't want no haircut. My daddy took a two-by-four to him a couple of times, and he went and got, went on and got a haircut.

Q. And a two-by-four is a piece of wood?

A. Not a two -- I mean a stove wood.

Q. What is a stove wood?

A. That's a piece of wood that he would tell us to cut 12 inches long so that it would fit in our stove. I remember that because we had to cut them that length.

Q. So it was 12-inches long. And how thick was it?

A. Probably about as big as - maybe bigger than my arm. About maybe four or five six inches. I'm not sure.

Q. And how old was Miguel at that time?

A. I'm not sure. I think that was around '70, maybe '70, '71. I'm not sure.

Q. Was it before or after Miguel left home?

A. It was before he left home.

Q. How old was Miguel when he left home?

A. I think he was 16. I'm not sure.

Q. Do you remember what happened that made Miguel want to leave home?

A. Well, you know, my dad used to do things like to scare us. Sometimes he would like shoot his gun off or something to make us listen, or we would we were

laughing and he would say: My kids don't respect me no more; they won't listen to me. We would be doing something and he was in the house. He would come outside and shoot his gun off real fast, a .22 automatic. It was like a semiautomatic or something. But it didn't bother us because we figured out he was just playing with us, he was just trying to scare us. We didn't pay no attention to that. But then one day Miguel - my dad don't like us to sleep without shirts on or underwear on or something. We couldn't sleep without, you know, something on. And one day Miguel was sleeping in the nude, you know. We had bunk beds. And my dad, I told my dad, I said, "Dad, Miguel is sleeping with no clothes on." So my dad went in there and started whipping on him. And Miguel was trying to, you know, he was getting a whipping, you know. It was hurting him, so he was kicking, you know. Laying on the bed just kicking, you know, while he whipping him. And I think he -- I'm not sure, but I think he cracked one of my father's ribs, you know, by doing that. My dad went and got a gun, a pistol. I think it was a .38. I don't know. It was a big round gun, like it was a revolver. He told him he was going take this whipping, or you're going to take this gun. And somewhere after that, I remember that Miguel just got stabbed. Well, at first what he did, he said, "You are going to act like a nigger on the street," he said, "I'm going to treat you like one." At that time, he pushed Miguel on the shoulder and put a knife on his neck like that. And he said, "Don't move, nigger." And then - and then - (pause) Miguel was sitting on the dresser with blood on the dresser.

Q. That was Miguel's blood on the dresser?

A. Yes.

Q. Do you want to take a minute?

THE COURT: There's some tissues right there if you want them.

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. Mr. Richardson, I know this is difficult, but just bear with me. Are you saying that your father stabbed Miguel with the knife at that time?

A. Yes. He stabbed him.

Q. What kind of knife was it?

A. It was a pocket knife that was, I think he made it because he used to make stuff like that. It had, I think a buck handle on it. It was white and brown, and a dear horn or something it was made out of.

Q. And what happened after that day?

A. And I don't remember anything after that day, that part right there when he stabbed him. I know he didn't take him to the hospital or anything, but he probably just took care of him. That's what he would do, he would doctor it hisself.

Q. Miguel was bleeding at the time?

A. Yes.

Q. And what did Miguel do after that?

A. He just sat there on the dresser and crying.

Q. Did Miguel leave home shortly after that?

A. Yeah. He left home after that.

Q. Was it just your father that hit Miguel or was there anyone else in the household that hit Miguel?

A. Well, Petillio would slap him a lot. Like he was sucking Kool Aid off the table or something, he would slap him on the top of his head and bust his mouth on the table, make his nose bleed several times. He would just pick on him all the time. He was the older brother.

Q. How often would you say that happened?

A. He may do something to him maybe once or twice a month because he never did get in trouble for hitting on him.

Q. And did your brother, Miguel, get hit by your mother?

A. Yes. He got hit. My mother would teach us how to read, teach him how to read, and she would take this sawed-off broom stick, you know, about how they made it, an inch around, and hit him with a broom stick. And like if he would miss a word, she would hit him on the back of the neck or something, or on the shoulder. If he didn't do it fast enough, she would hit him, you know. And then when he got to where he was scared to say anything, then she would hit him anyway. Hit him because he wouldn't say anything, until he would say something.

Q. How old was Miguel at that time?

A. She did that from when he was probably the first grade on to middle school until he got in high school, and she just quit doing it because she quit trying to teach him because she couldn't teach us.

Q. And how often do you recall your mother hitting Miguel the way you just described?

A. Probably three times a week. Whenever he had homework to do and he couldn't do it.

Q. Did your mother do anything else in terms of talking to your father or communicating with your father in terms of hitting the children?

A. Well, yeah. She used to make a list that things that we did, and she would write on it, you know, our names down and she would make a number of how many things that we did wrong. And if it got to a certain number, we would get a whipping. And she would do it herself sometimes, but if she had to whip you, then my father would say, "You don't make my wife mad," and you would get another whipping from him, too, from upsetting his wife.

Q. Do you remember any other instances of where when you were being baby-sat by your sister?

A. Yes. I know I was around - it was right before we moved on the farm. Miguel was six and I was five. And we were sitting in the doorway of my father's room because we couldn't go inside because he didn't allow us to go in his room. And I Love Lucy show was on. I can tell you everything she was wearing. She had a black dress on, black shoes, and her hair was up in a bun, and it was curly in the front.

MR. SHAUGHNESSY: Can we have a clarification as to who we're talking about?

THE WITNESS: Loleta.

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. Let me clarify this a little bit. What you just described as the person with the hair and dress and so forth, who was that?

A. That was Lucy Ricardo on just a show, the Lucy and Ricky show.

Q. And otherwise, you are relating an incident dealing with your older sister, Loleta?

A. What I'm telling you is everything I can see. Right now I can see it just as clear. I can tell you - I couldn't read the TV, but I know the first letters were L and the last letter on the TV was a big O, just the name on the TV. I remember everything. The sunshine was in the room about a 45-degree angle. It was around about probably 10:00 in the morning. I know it was a black bedspread. It was red roses embroidered on it. And I remember the carpet. And I remember Loleta saying that if - she said - we didn't take a bath but once maybe a day, or if we wasn't dirty, we wouldn't take one at all because we had to save on the water bill because there was so many of us.

So, Loleta said, "If y'all take a bath," she said, "I'll give you some butter cookies and chocolate milk." You know, we liked butter cookies and chocolate milk.

Q. How old was Loleta at this point?

A. She was a teenager. I'm not sure exactly what age she was.

Q. Okay.

A. And so she told Miguel to go first because they knew I didn't like to take baths at that time. So she took Miguel first, and they turned - I heard the sink water on. I said, they are teasing me, they are tricking me. They want me to take a bath. Because I heard the water. I was thinking that. And then so many minutes later, I think they were in there maybe, I don't know, I can't remember how long. It could have been 20 minutes, 10 minutes, it could have been five. I'm not sure how long.

But then Miguel came out and he sit in the hallway up against the dresser, up against the drawers where you put the towels and stuff in the hallway in front where the TV, watching the TV. He just sit there with his head down. And I said, "You didn't take a bath, did you?" I said, "You all are tricking me." And he didn't say nothing.

She told me to come on in there and I went in there. And then she told me to suck her right there, you know. And I did. And I remember - I don't remember, you know, I know it was her. But I don't remember seeing her face, because I guess I didn't want to see her. And then she washed my private off. That's all I remember at that point. So I figured that Miguel, it happened to him the same way.

Q. Okay. I know this is difficult for you, Mr. Richardson, but I have to ask you to be a little bit more specific about where she asked you and where you sucked her.

A. Well, her private. She told me to suck her on her private. And I did. I don't know how I felt. I

don't know how I felt when I did it. I know I didn't see anything, but I know I did it.

Q. Do you have any recollection of whether this type of thing happened again to you and Miguel?

A. Well, I know it didn't happen to me anymore, but I think she continued with Miguel, but not me.

Q. And while you and Miguel were growing up, did anyone else in the family hit or whip Miguel?

A. Well, Loleta used -- Loleta didn't like him. She always hated him. And she used to slap him around, throw stuff at him. One time he put some hair grease all over my face, and she stomped on him about six or seven times until his nose started bleeding. His nose bleed easy.

Q. Where was she stomping on him?

A. She stomped him --

Q. What part of his body was she stomping?

A. She was stomping him in the chest area and the stomach. She was just jumping up and down on him.

Q. How old was she at the time?

A. She was a teenager.

Q. How old was Miguel?

A. Probably about six or seven.

Q. And how often did those types of incidents happen with Loleta and Miguel?

A. Well, she mostly would just scratch him all the time or choke him. You know, like he had been drinking water or something, and she would choke him until water would come out of his mouth, stuff like that.

Q. How often would those sorts of things happen?

A. She would get mad. I think she did stuff to him at least three or four times a week, just all during the day, just doing stuff to him.

Q. Switching to a different time, Mr. Richardson, did there come a time when your parents sent Miguel to Dell City High School?

A. Yes. We lived in an area that was difficult, even today they can't hardly figure it out. We lived in a county district and it's kind of in the city district, and it's like we can go to either school. We can go to county or city school. And Dell City, the schools wasn't bussed then. They didn't bus the schools. But Pleasant Hill was already integrated, it was an integrated school. It probably had maybe six, seven families in Pleasant Hill in the school. And Dell City might have had two, and there was a lot more people in Dell City. And Miguel wanted to go to Douglas, another school besides that school. He said - he would come home complaining about that the white guys would try to jump on him. They wouldn't let him play on the football team. They would chastise him or try to make him do stuff.

Q. Was this at Dell City now?

A. Yeah. Dell City.

Q. About how many black children where there at the school?

A. What I was hearing from my parents, probably maybe just two families. Our family and their family. Just Miguel and another family. I think it was a guy and a girl.

Q. And what did you observe about Miguel coming home from that school?

A. Well, he didn't ever talk to me about what happened in school much. But he talked to my parents. And I remember seeing him one time he came home with his hands broke, and they put a cast on him.

Q. Both hands were broken?

A. I think so, if I can remember. And another time he went to school, and there was a bomb threat made, you know. And --

Q. Who made the bomb threat?

A. Miguel said, they said Miguel did. But Miguel was always, you know, he said he was being like pushed into things, had to do things. One time they got him drunk, and Miguel --

Q. Who is they?

A. He said some guys got him drunk and tried to beat him up. That's when he got his hand broke that day. They got him drunk and tried to beat him up. And my dad, the principal called my dad to come get him from school.

Q. When you say they got him drunk and his hands were broken, who was they?

A. I think it was the guys on the football team.

Q. They were white boys or black boys?

A. They were white guys.

Q. Now, before, at or about the time that your brother, Miguel, was on trial in '81, did any of his lawyers, his trial lawyers contact you?

A. No.

Q. To talk about the things that you just testified about?

A. No.

Q. Where were you living at the time?

A. Well, I was living at Kipnaps on Northeast 23rd.

Q. In Oklahoma City?

A. Yes.

Q. Did you know that your brother was on trial for murder at that time?

A. No.

MS. KEANE: I have no further questions.

CROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Mr. Richardson, what do you do for a living?

A. Well, I used to work for Oklahoma City Street Department for 15 years. And then now I'm a costume designer, entertainer.

Q. In Oklahoma?

A. Yes.

Q. Your brother, Miguel, was a costume designer of some sort at one time; is that correct?

A. Well, he used to teach modeling. He used to model hisself.

Q. And we have been referring to him for the last hour or so. Is this your brother in the orange outfit with the wire-rimmed glasses?

A. Yes, it is.

Q. When was the last time you saw him?

A. Right about a year ago, I think. I'm not sure exactly how long. It could have been a year ago.

Q. You say that you were unaware that in 1981 your brother was in San Antonio being tried for the offense of capital murder; is that correct?

A. I didn't understand.

Q. At the time he was being tried, were you aware of the fact that he was being tried for the murder of those two security guards?

A. Not at the time. No.

Q. All right. When did you find out that he had been charged with that crime?

A. Well, my sister called, Paquita Richardson. She lived in Houston Texas.

Q. Paquita?

A. Paquita. She said that she saw it in the paper. That's how we found out. And my parents told us.

Q. Did you know that your brother was arrested in Colorado for this offense?

A. Well, I didn't know that he was arrested in Colorado until after I found out that he was being tried for murder.

Q. So there was some three-year period of time where you had no idea where your brother, Miguel, was or what he was doing; is that true?

A. It couldn't have been three years.

Q. Well, you didn't know he was arrested in Colorado; is that correct?

A. Right.

Q. And you didn't hear about the fact that he was being tried in San Antonio until after the trial; is that right?

A. Right.

Q. And if the record shows that's in excess of two and a half years, then it's fair to say you didn't know where he was for over two and a half years?

A. Well, the last time I saw Miguel before I heard from him - I'm not sure what year it was. I can't remember the date or year. I'm not good at remembering a lot of things like that. I don't know my brothers' and sisters' ages, most of them, but Miguel's and Paquita's age, and that's all. I don't know the rest of them's age or birthday. I'm not sure exactly how old my own kids are, really. And I just don't remember stuff like that.

Q. That's fine. Do you remember an individual by the name of Rhonda Bearden?

A. I'm hard with names. No.

Q. Did you ever have an occasion to meet an individual by the name of Vicky Franklin?

A. Yes. I met Vicky Franklin.

Q. And how did that happen? How did you come to meet Vicky Franklin?

A. Well, I was dating her sister, and I met her through her sister.

Q. Were you living with Victoria, or Vicky Franklin's sister?

A. Yes.

Q. And at that point, was Miguel living with Vicky Franklin?

A. No. He was living with us, her sister.

Q. At some point, Miguel and Vicky Franklin left the metropolitan area of Oklahoma City; is that correct?

A. Well, I know Miguel was going to Colorado, but I didn't know where she was going or if she went anywhere or not.

Q. All right. But at some point, your brother left Oklahoma, and the next you heard about him was from your sister, Paquita, and she told you he was on trial for murder in San Antonio?

A. Well, she told my mother and father, and they told the rest of the family.

Q. So, is it fair to say that you know nothing about whether or not your brother is guilty of shooting to death on March 31st, 1979, two individuals by the name of Howard Powers and John Ebbert?

A. Could you say that again?

Q. Do you know anything about whether or not your brother, Miguel, is guilty of causing the deaths of Howard Powers and John Ebbert on March 31st of 1979?

A. No, I don't.

Q. So, if Mr. Cazier, and the record reflects that he was one of Mr. - or your brother's trial attorney, if Mr. Cazier had contacted you prior to your brother's trial for causing the deaths of these two individuals, you would not have been able to provide him any evidence that would show that your brother did not commit those crimes; is that correct?

A. Like I said, the only time - the last time I saw him was when he was going to Colorado.

Q. It's a real simple question. If Mr. Cazier had called you and said, Julio, I represent your brother Miguel. He is charged with shooting to death two security guards in San Antonio on the last day of March of 1979, could you have provided Mr. Cazier with any evidence whatsoever from any source which he could have utilized to show that Miguel Richardson did not shoot those two security guards?

A. Well, I couldn't, because I didn't see him after he left.

Q. Right. You know nothing about it.

A. No.

Q. Have you ever spoken with your brother about it?

A. No.

Q. Have you ever inquired of him how he came to be convicted and sentenced to death in San Antonio?

A. He never talked about those things.

Q. Have you ever asked him?

A. No.

Q. Has your brother ever told you, Julio, I am innocent of the crimes of which I have been convicted?

A. He just wanted to know how his family was doing.

Q. All right. That's nice to know. But the question was: Has he ever said to you, Julio, I'm innocent, I didn't commit the crime that has caused me to be incarcerated on death row?

A. No.

Q. Now, you say that you were not contacted by any of your brother's attorneys prior to trial; is that correct?

A. For this trial?

Q. No. Before the trial 16 years ago.

A. No.

Q. All right. Do you know or do you have any reason to believe that your brother ever told them where they could find you?

A. No. I don't know.

Q. All right. So as far as we know, those lawyers didn't even know where to find you; is that correct?

A. They could find me.

Q. If they knew where you were.

A. It's easy to find me.

Q. Right. But they would have to get that information from your brother, right?

A. Yes.

Q. And if he didn't tell them, then they are not going to be able to find you, right?

A. Right. I guess.

Q. He would have to tell them that you even existed; isn't that correct?

A. I don't know what he told them.

Q. Right. That's the whole point. Did you ever have any contact with your brother after his arrest and prior to his trial, either in person, on the phone, or through the mail?

A. Which trial?

Q. The one 16 years ago. That's the only trial we are concerned with.

A. No.

Q. You said that your father at some point stabbed your brother, Miguel?

A. Yes.

Q. Did your brother stab him back?

A. No.

Q. And you related that you were at one point the subject of sexual abuse committed upon you by your sister, Loleta.

A. Yes.

Q. All right. And you think that Miguel was also the victim of that; is that correct?

A. Yes.

Q. And you did not see that occur; is that correct?

A. I saw him go in the bathroom.

Q. But you weren't in there when whatever happened happened?

A. No.

Q. Did you ever talk to an individual by the name of Mr. Keith Burris prior to the 1981 trial?

A. I don't remember that name.

Q. Did you ever talk to an individual by the name of Mr. Bill Blagg?

A. I don't remember that name.

Q. Did you ever talk to an individual by the name of Joseph Janysek?

A. I don't remember that name.

Q. Did you ever talk to an individual by the name of Steven C. Hilbig?

A. No.

Q. Did you ever talk to any members of the Bexar County District Attorney's Office and relate to them these events that you have described, particularly the sexual assault committed upon you by your sister, Loleta?

A. When?

Q. In 1981.

A. I don't remember that date. I don't remember what happened on that date.

Q. All right. Did you ever tell anyone from the District Attorney's office from San Antonio that, look, my sister, Loleta, abused me, and I think she abused Miguel?

A. No.

Q. All right. Did you ever tell any members of the District Attorney's Office that, my father stabbed Miguel?

A. I never told anyone about my family's business.

Q. All right. So that information was never given to either the defense lawyers for your brother or the prosecutors for your brother?

A. No.

Q. Do you know anything about the incident which resulted in your brother being incarcerated in Federal prison?

A. When, at this --

Q. No. Years and years ago. Back in the early seventies. The welfare fraud deal. Do you know anything about that?

A. Yes. I remember when he went.

Q. Do you know if your brother ever abused drugs growing up with you in Oklahoma?

A. My brother was an athlete. He didn't want it. He always lifted weights and stuff. He took care of hisself.

Q. All right. So, there is no history of drug abuse with your brother as far as you know?

A. No.

Q. Do you know anything about the relationship your brother had with Victoria, or Vicky Franklin?

A. Well, he was dating her.

Q. Well, when he dated her, did he father a child with her? Do you know?

A. Not that I know of.

Q. Does he have any children?

A. Yes, he do.

Q. Do you know who the mothers are?

A. Well, I don't know. I know them, been knowing them forever, but I don't know their names. I've got her daughter with me right now.

Q. Do you know how many children he has?

A. One that I only know.

Q. And she lives with you?

A. No. She don't live with me. She came - I brought her down here to see her father.

Q. So she's here now, but she doesn't live with you?

A. No. She doesn't live with me.

MR. SHAUGHNESSY: May I approach the witness?

THE COURT: You may.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. During the course of your brother's trial in 1981, your sister, Paquita, was called as a witness to testify on his behalf.

A. Yes.

Q. By Mr. Cazier, his trial attorney. I would like you to read some pages of that testimony, starting at the top of page 129.

A. Are you going to read it? I can't read it.

Q. All right. I'm referring, for the benefit of counsel, to testimony elicited during the course of the punishment phase on September 16th, 1981 during the course of the testimony of a woman by the name of Paquita Richardson, who in her testimony identified herself as Miguel's sister. All right.

And she stated that she was just a couple of years younger than Miguel. And then the testimony starts developing, and Mr. Cazier starts asking questions. And he says: "Okay. When you were real small, where did you live?" And she answered, "We stayed - we had sort of like, a farm, and we had cows, one horse, which belonged to Miguel, and each child had his own pet. We had two ponds."

Question: "Let me ask you this, Paquita, did you live in the slums?" "No." "Were you poor?" "We were not poor. We had our own garden. Excuse me. We raised our own vegetables. We had a few hogs. And from time to time, my father and I and the rest of the children went to slaughter the hogs and freeze them. We had our own. We were pretty self-supporting. We ate well. We were happy, and we had a couple of tree houses. And we played. We were very close and had a childhood, a normal childhood, of course."

Now, is Paquita Richardson, when she testifies to that effect, that she and her family, her brothers and sisters had a normal childhood, is she incorrect?

A. Well, it depends on how - who is she - how can I say it? Who is she putting it next to, whose family she had to see. I had to see what is normal. What is the normal family or how kids are raised? I don't know. I just know how I was raised.

Q. Well, did you think when you were being raised that you were in an abnormal family?

A. They always told us they loved us when they whipped us.

Q. All right. Are they still alive today?

A. Yes, they are.

Q. Do they know you are here today?

A. Yes, they do.

Q. Are they here?

A. No.

Q. Have any of your other brothers and sisters been convicted of murder?

A. No.

Q. Have any of your brothers and sisters been convicted of felonies to your knowledge?

A. I'm not sure, really.

Q. Have you ever been convicted of a felony?

A. No.

Q. Are any of your other brothers and sisters presently incarcerated in prison in any state that you know of?

A. No.

Q. If it can be said that your brother was abused by his father, and mother, and older sister, do you have any knowledge whatsoever that would indicate that that abuse caused him to kill Howard Powers and John Ebbert on March 31st, 1979?

MS. KEANE: Your Honor, I object to that line of questioning. That's a question for an expert.

THE COURT: That's overruled.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Let me rephrase. Do you know of anything that ever happened to Miguel when you were growing up with him that would cause him to kill two unarmed security guards?

MS. KEANE: I renew the objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: Would cause him to kill someone?

MR. SHAUGHNESSY: Would cause him to kill two people.

THE WITNESS: I can't see my brother doing that because what he always taught me. My brother, to me, was like my father, and Loleta was like my mother. Right now today, to me my father is just an authority figure and my mother is just an authority figure. I don't know how I love her or nothing. I don't know. So I can't see what my parents did to us to commit anyone to do some type of murder, because we were raised in a Christian home in what we thought was a good family or a normal family. We wasn't sure because we didn't have anything to relate to because we was always together and there wasn't no families around. We couldn't have friends over. We couldn't go spend the night with no one. So we didn't really know. I was told that I was abused. I didn't know.

BY MR. SHAUGHNESSY:

Q. And you were told when?

A. Well, I was asking, you know - Well, some lawyers came down and just talked to me about --

Q. Lawyers for who?

A. For Miguel's lawyers.

Q. So, is it my understanding that you have now come to a conclusion that you may have been the subject of abuse after you discussed the incidents with lawyers for your brother?

A. I never said I was abused.

Q. All right. Have you come to the conclusion that you lived in an abusive household after it was suggested to you by lawyers for your brother?

A. I'm not a judge, because I don't know really if I was abused or if it's abuse. If you look at it as abuse, I don't know however it is abuse. To me, I felt, when I saw my brother and my family whip - my sisters and brothers getting hurt, it didn't feel too good to me when I was a kid. It hurt me really bad. That I told on him when he got stabbed, I felt it was my fault that he got stabbed. So I don't know. I don't know.

Q. All right. Well, let me back up. Prior to discussing these incidents with your brother's lawyers, and when I say lawyers, I mean his current lawyers.

A. Right.

Q. Did you think in your own mind that Miguel grew up in an abusive household?

A. Well, the age I am now and what I know now, yes, I do.

Q. All right. But before, I mean ten years ago, did that thought exist?

A. Well, I don't think that he should have been whipped like he was.

Q. All right. But, put that aside. Did you consider or did you believe that he grew up in an abusive household prior to discussing these incidents with his lawyers?

A. Well, I already knew that it was wrong, but then I thought everybody got the same punishment at those times. I thought every parent did their kids the same way. I didn't know. I don't know.

Q. Now, during the course of the punishment hearing, Mr. Cazier went on to ask certain questions of your sister, Paquita, regarding Miguel's schooling. I'm referring to page 131 of that same volume. And Mr. Cazier asked her:

"Was there any real racial conflicts at Dell City when you and Miguel were going there?" Answer: "Never." Question: "Did Miguel get along well with the other students?" Answer: "Yes. He had a lot of friends. Everybody liked him."

Question: "How did he do?" "He was an average student." "Did he participate in sports?" "He played football and the coach thought he was an excellent player."

Is your memory of your brother's experiences in high school different than what Paquita testified to in 1981?

A. All I know about Miguel in his school was about that when he came home and the injuries he had, or what my father said, he had to go get him, and I saw him drunk. The things I said. I don't know how good an athlete Miguel was in school, because I wasn't in his school. I didn't go to that school.

Q. So your only memory of Miguel and how he did or how he got along in school was that he came home with injured hands on one day. Is that your recollection of it?

A. Well, I know that Miguel was well liked by everybody that I had known. I never heard anyone talk bad about him. I didn't know - I know he would tell me they would pick on him or try to get him to do stuff, like dare you, or dares, get you to do things like that. But as far as, you

know, what year he played football or how good he was in football, I know he was a good athlete because I know my brother at home and how he was and everything. He was always good.

Q. All right. But I would like to back up. I think I heard you testify that your brother came home one day from school with broken hands; is that right?

A. Right.

Q. And could you elaborate on that? When was that and what is your memory?

A. I remember that it had to be in the 10th, 11th grade, somewhere in there, because Pleasant Hill goes to the 9th grade. And I remember that he went to Dell City. I don't remember. I'm not really sure, remember Ki-Ki going to Dell City, but she said she did. I don't remember.

Q. Then one day what happened with these broken hands or these injured hands? What happened?

A. I don't remember.

Q. Your brother just came home with these injuries? Is that it?

A. Yes. That's all I know. That's the time he got drunk or something. They got him drunk and he got into a fight with them. They tried to get him drunk and beat him up. That's all I know.

Q. All right. But you didn't see the fight, right?

A. No.

Q. And the possibility exists that the other individual he fought with may have suffered more serious injuries? Is that possible?

A. Well, my brother was always a good fighter, so it could have been. He didn't tell me that he hurt anyone or not.

Q. Did Miguel attend church on a regular basis when he was growing up?

A. If you lived at my Dad's house, you had to go to church no matter what age you are, every Sunday.

Q. That was for, what, 13 or 14 years?

A. Until he left home.

Q. Sang in a choir?

A. Yes.

Q. Did you sing in a choir with him?

A. I couldn't read.

MR. SHAUGHNESSY: No further questions.

MS. KEANE: No further questions, Your Honor.

THE COURT: Thank you. You are excused.

THE WITNESS: Thank you.

* * * * * *

(WHEREUPON, at this time, the Witness was excused.)

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THE COURT: We'll start again tomorrow at 9:00 o'clock.

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RECESS

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EX PARTE MIGUEL A. RICHARDSON

Habeas Corpus Application

WRIT NO. 29,821-02

from BEXAR County

DISSENTING OPINION

This is a post-conviction application for writ of habeas corpus filed pursuant to Tex. Code Crim. Proc. Ann. art. 11.071.[1] Applicant presents a claim for relief based upon

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[1] The procedural history of applicant's case is as follows:

- Defendant was convicted of capital murder in Bexar County on Sept. 10, 1981.
- We affirmed, 744 S. W .2d 65 (Tex. Ct. App. 1987).
- On petition for writ of certiorari, the United States Supreme Court vacated and remanded, 492 U.S. 914, 109 S.Ct. 3235.
- On remand, we again affirmed, 886 S.W.2d 769 (Tex. Ct. App. 1991).
- On petition for writ of certiorari, the United States Supreme Court again vacated and remanded. 113 S.Ct. 3026.
- On remand, we again affirmed, holding that: (1) evidence of defendant's voluntary service and kindness to others, artistic and poetic talent, and religious devotion, did not require separate special jury charge during punishment phase; and,

a belief that his "constitutional rights to the effective assistance of counsel, to present mitigating evidence, and to due process and a fair trial were violated by the trial court's allowance of the testimony of Dr. Rast, a surprise witness."[2] Believing this claim should be remanded to the habeas court for findings of fact in light of Estelle v. Smith, 602 F.2d 694 (5th Cir. 1979), I dissent.

Originally the State had filed a witness list with no doctors, psychiatrists or psychologists designated. Upon inquiry from the defense, the State amended the witness list to include Dr. Grigson and Dr. Schroeder as expert witnesses. However at trial, the State did not call either of these designated expert witnesses; instead, the State called Dr. Rast, who was not on the State's witness list. The defense objected stating:

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(2) allegedly mitigating evidence of defendant's character and upbringing did not require separate special jury charge. 901 S.W.2d 941 (Tex. Ct. App. 1994).

• Certiorari was denied June 26, 1995. 115 S.Ct. 2617.

2 Contrary to the trial judge's assertion that this claim for relief was raised and rejected on direct appeal, this issue was never raised under the constitutional parameters of the Sixth and Fourteenth Amendments.

> The Defendant has never been apprised that this gentlemen on the witness stand will be a witness. We don't know who he is. We don't know what he is. I've never heard his name before it was called by the prosecutor to bring the man into the courtroom. We are surprised. We are not prepared to meet, explain or rebut his testimony, whatever it may be. We have no idea what it may be. I understand the man may be a psychologist.

R. Vol. VII, pp 184-85.

The defense cited Smith v. Estelle, 602 F.2d 694, 699 (5th Cir. 1979), aff'd on other grounds, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), as support against the surprise testimony of Dr. Rast. In Smith, the Fifth Circuit affirmed the district court's granting of habeas relief, holding the testimony of the surprise witness, Dr. Grigson, violated Smith's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, his Eighth Amendment right to present mitigating circumstances, and his Fifth Amendment right not to be forced to incriminate himself. Id. 602 F.2d at 698. The Fifth Circuit held:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for (defense) counsel to challenge the accuracy or materiality of " evidence, Gardner v. Florida, 430 U.S. at 357, 97 S.Ct. at 1204, and in

> foreclosing "that debate between adversaries (which) is often essential to the truth-seeking function of trials," Id., at 360, 97 S.Ct. at 1206 . . . . And despite the trial court's order that the state's attorney list "all the State's witnesses whom he in good faith expects to use at the trial of the State's case in chief, both during the guilt or innocence state (sic) and the punishment stage," App. 97, the prosecution did not list Dr. Grigson's name. The consequences of this surprise were devastating. Thus the trial judge's informality and the prosecution's tactics combined to give Smith's attorney's no chance to prepare an effective response to Dr. Grigson's testimony or to impeach it in any significant way. Surprise in this case impaired "the interest in reliability," Id. at 359, 97 S.Ct. 1197 as much as secrecy did in Gardner.

Smith, 602 F.2d at 700-01.

The difference between Smith and the instant case is that Dr. Rast did not interview applicant, but instead offered an opinion of a hypothetical defendant who committed exactly the sane offense as applicant. However, the reasoning of the Fifth Circuit applies here. Defense counsel was completely surprised by Dr. Rast and objected on the record, stating he was unprepared to cross-examine the surprise witness. In fact, the trial judge acknowledged defense counsel was fully prepared to cross-examine the listed witnesses,

stating, "I know you were loaded for bear on the other two doctors." R. Vol. VII, pp 197-98.

With these comments, I dissent.

BAIRD, Judge

Overstreet J., joins this opinion but also believes the first and seventh claims for relief should be filed and set.
Delivered: June 10, 1998
En Banc
Do Not Publish

81-CR-1548-W1

EX PARTE: § IN THE DISTRICT COURT

MIGUEL RICHARDSON, § 175TH DISTRICT COURT

Petitioner § BEXAR COUNTY, TEXAS

PROPOSED ORDER

The petitioner,[1] Miguel Richardson, through his appointed attorney, Daniel Lane, has filed an application for a post-conviction writ of habeas corpus under the provisions of Art. 11.071, Tex. Code Crim. Proc. Ann. (Vernon Supp. 1997) collaterally attacking, for the first time, his conviction for the offense of Capital Murder and a sentence of death.

Procedural History
Of The Case

On May 20, 1981, Richardson was indicted by a Bexar County grand jury for the March 31, 1979, murder/robbery of John G. Ebbert. Trial commenced on September 2, 1981 before Judge Preston H. Dial, Jr. On September 16, 1981, Richardson was found guilty of the offense of charged in the indictment. On September 18, 1981, the jury answered the statutory special issues adversely to Richardson and the death penalty was assessed.

An appeal was undertaken and on October 28, 1987, Richardson's conviction and sentence were affirmed by the Court of Criminal Appeals. Richardson v. State, 744 S.W.2d 65 (Tex. Crim. App. 1987). On July 3, 1989, the Supreme Court vacated the judgment of the Court of Criminal Appeals

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[1] Hereinafter referred to as Richardson.

and remanded the case for further review. Richardson v. Texas, 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583 (1989). On June 12, 1991, the Court of Criminal Appeals affirmed the judgment a second time. Richardson's motion for rehearing was denied on September 18, 1991. On June 28, 1993, the Supreme Court of the United States once again vacated the judgment of the Court of Criminal Appeals and remanded the course for further consideration. Richardson v. Texas, 509 U.S. 917, 113 S.Ct. 3026, 125 L.Ed.2d 715 (1993). On June 1, 1994, the judgment was affirmed for the third time by the Court of Criminal Appeals. Richardson v. State, 901 S.W.2d 941 (Tex. Crim. App. 1994). On June 26, 1995, the Supreme Court denied Richardson's petition for writ of certiorari. Richardson v. Texas, _____U. S. _____,115 S.Ct. 2617, 132 L.Ed.2d 859 (1995).

On June 27, 1996, Daniel M. Lane, Jr. was appointed to represent Richardson for purposes of filing the instant writ of habeas corpus. The instant writ was timely filed on December 17, 1996. On December 30, 1996, this Court entered a scheduling order and granted Richardson a hearing on five of his claims for relief. A hearing on the application commenced on April 29, 1997 and concluded on July 1, 1997.

The application for habeas corpus relief filed by Richardson contains fifteen claims for relief.[2]

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[2] References to the record of the trial will be cited as (T.R. _____). References to the record of the writ hearing will be cited as (W.R. _____).

Findings Of Fact And
Conclusions Of Law On
Petitioner's First Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 7)

In his first claim for relief Richardson claims this Court reversibly erred in excluding venireman William Noble. (T.R. III-156)

This allegation of error was raised and decided adversely to Richardson on direct appeal. Richardson v. State, 744 S.W.2d at pgs. 67 thru 71. Inasmuch as this claim for relief has been previously decided adversely to Richardson it cannot form the basis for relief in a post-conviction writ of habeas corpus. Ex. Parte Acosta, 672 S.W.2d 470 (Tex. Crim. App. 1984).

The petitioner's first claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Second Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 18)

In his second claim for relief Richardson claims that this Court erred in admitting at the punishment phase evidence of 1973 conviction from the United States District Court for the Western District of Oklahoma. (State's trial Exhibit no. 51) Richardson asserts that Exhibit no. 51 reflects a conviction that was rendered null and void because it has been set aside under the terms of the now-defunct, Federal Youth Corrections Act.

This allegation of error was raised and rejected by the Court of Criminal Appeals on direct appeal. Richardson v. State, 744 S.W.2d at 82. Inasmuch as this claim for relief has been previously decided adversely to Richardson it cannot

form the basis for relief in a post-conviction writ of habeas corpus. Ex Parte Acosta, supra.

The petitioner's second claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Third Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 27)

In his third claim for relief Richardson claims that he was entitled to a special instruction pursuant to Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) so as to permit the jury to consider and give effect to all potential mitigating evidence.

This claim has been raised in the Court of Criminal Appeals on three separate occasions. It has been rejected on each and every one of these occasions. As a result it cannot form the basis for a post-conviction writ of habeas corpus. Ex Parte Acosta, supra.

Richardson also asserts that a en charge was required because his trial counsel was "chilled" by the pre-Penry holdings of the Court of Criminal Appeals. The petitioner relies on evidence presented, not at trial, but rather at the post-conviction writ of habeas corpus hearing. Evidence which could have been, but was not presented at the punishment phase of Richardson's trial, cannot support a claim that a Penry charge was erroneously denied. Ex Parte Goodman, 816 S.W.2d 383, n.6 (Tex. Crim. App. 1991).

The petitioner's third claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Fourth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 50)

In his fourth claim for relief Richardson claims that this Court erred in allowing the prosecution to present the testimony of Robert Rast, a "surprise witness," resulting in a denial of his right to effective assistance of counsel and due process of law.

This complaint was raised and rejected by the Court of Criminal Appeals on direct appeal. Richardson v. State, 744 S.W.2d at pgs. 76 thru 78. As a result it cannot form the basis for relief on a post-conviction writ of habeas corpus. Ex Parte Acosta, supra.

The petitioner's fourth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Fifth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 8)

In this claim for relief petitioner asserts that the methods employed by the Texas Department of Criminal Justice[3] in carrying out executions[4] present an undue risk of unnecessary and tortuous pain in violation of the Eighth Amendment's prohibition against cruel and punishment.

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3 T.D.C.J.

4 Art. 43.14, Tex. Code Crim. Proc. Ann. (Vernon Supp. 1997).

The petitioner's claim is foreclosed by the holding of the Court of Criminal Appeals in Ex Parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978) wherein the Court held:

> Petitioner, who had the burden of proof at the habeas corpus hearing, offered no persuasive proof that execution by intravenous injection of a lethal substance is inherently cruel and inhumane. He now argues, however, that possible complications in the intravenous injection procedures might, cause additional pain to the condemned prisoner. We conclude that that possibility, should it arise, does not make the means of inflicting death inherently cruel. Rather, it could be characterized as a possible discomfort or suffering necessary to a method of extinguishing life humanely.
> Ex Parte Granviel, id, at pg. 510.

The petitioner claims that the holding of Granviel is not applicable to him because of evidence which has come to light since 1978 when Granviel was decided.

The evidence, according to Richardson, reveals that the methodology employed by T.D.C.J. creates an undue risk of unnecessary pain and suffering during the course of an execution. In support of that contention Richardson brought forth the testimony of two witnesses, Dr. Edward Brunner and Deborah Denno.

Dr. Brunner was an anesthesiologist and pharmacologist who testified that if the drugs utilized by T.D.C.J., in carrying out an execution, were to be administered in an insufficient dose or improper sequence than a possibility could arise in which the inmate could suffer "unusual pain and suffering in the process of the execution." (W.R. III-88) Dr. Brunner did not testify that T.D.C.J. employed the wrong sequence or utilized insufficient dosages

of the required drugs. on the contrary, Dr. Brunner testified that he had a specific knowledge of T.D.C.J.'s procedures being deficient in either of those respects. (W.R. III-134, 135, 143) He also related that if used correctly the drugs utilized by T.D.C.J. would be appropriate for carrying out an execution without the unnecessary risk of pain and suffering. (W.R. 111-122, 130)

Dr. Brunner also expressed his opinion that if a given individual had excessive scarring of his veins then a possibility could arise that an improper flow of the drugs could pose a risk of undue pain and suffering. (W.R. III-53, 54) However, it was also established that Dr. Brunner had examined Richardson and concluded that Richardson did not suffer from the type of scarring that could pose the risk in question. (W.R. III-140, 141)

Professor Deborah Denno was a criminologist employed by Fordham University. (W.R. IV-264) Professor Denno was of the opinion that, based upon her studies, the State of Texas' method of execution had resulted in eleven "botched" executions since 1982. (W.R. IV-302) This record, of what are characterized as "botched" executions, led Professor Denno to conclude that the lethal injection procedures employed by the State of Texas create a "substantial and unnecessary risk of extreme pain and prolonged suffering." (W.R. IV-293) During the course of her testimony it was established that Professor Denno's study consisted primarily of reading newspaper accounts of executions carried out by the State of Texas. (W.R. IV-285, 335, 336, 341) It was also established that Professor Denno did not "have any idea how the State of Texas executes anybody." (W.R. IV-394) When asked how the State of Texas could compile an execution protocol which would eliminate her perceived risk of undue pain, Professor Denno responded in a very telling manner. She stated:

> I would say, first of all, and I'm not an expert on how an individual should be executed, and that the State of Texas should get experts who know something. Because from what I can tell, they haven't done that. There is nothing to suggest that they have gone to medical experts to have them devise their protocol. And I would suggest that they start going to somebody who is an expert and not somebody like myself. (W.R. IV-396, 397) (emphasis added)

In Ex Parte Granviel, id., the Court of Criminal Appeals concluded that the possibility that the procedures employed in carrying a lethal injection might result in pain to the condemned did not render the procedure constitutionally infirm. The evidence produced by Richardson establishes nothing more than that presented in Ex Parte Granviel: a possibility of pain during the procedure.

The petitioner's fifth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Sixth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 55)

In his sixth claim for relief Richardson advances a contention that his execution is barred because the time which has elapsed since his conviction amounts to cruel and unusual punishment.

Findings of Fact

An adequate chronology of the procedural history is contained in petitioner's exhibit no. 28 which was admitted at the post-conviction writ hearing. (W.R. V-614) The exhibit is incorporated herein. Two other matters of importance were established during the course of that hearing. First, with the

exception of extensions of time sought by the State to reply to his pleadings, in either the Supreme Court of the United States or the Court of Criminal Appeals, all the time which elapsed between February 23, 1988 and July 5, 1995 was due solely to efforts lodged by the petitioner to have his conviction and/or sentence reversed by the Supreme Court (on petition for writ or certiorari) or the Court of Criminal Appeals (on remand from the Supreme Court). (W.R. V-637) Secondly, the record is wholly devoid of any evidence which even remotely suggests that the petitioner ever communicated his concerns over the time being taken to resolve his case, to the Court of Criminal Appeals or the Supreme Court.

The petitioner characterizes the time which has elapsed since the original affirmance as delay. This Court declines to characterize it as such. From all indications, the time taken to resolve the issues so far presented, was due primarily to the complexity and uniqueness of the legal issues presented. Although the issues were ultimately decided adversely to Richardson that does not translate into a claim of cruel and unusual punishment on the basis of a perceived delay.

Conclusions of Law

The claim advanced by the petitioner has been uniformly rejected in all forums in which it has been pursued. See: Carter v. Johnson, 110 F.3d 1098 (5th Cir. 1997); White v. Johnson, 79 F.3d 432 (5th Cir. 1996); Stafford v. Ward, 59 F.3d 1025 (10th Cir. 1995), cert. den. _____ U.S. _____, 115 S.Ct. 2640, 132 L.Ed.2d 896 (1995); McKenzie v. Day, 57 F.3d 1461 (9th Cir. 1995); adopted by Court en banc 57 F.3d 1493 (9th Cir. 1995); State v. Smith, 931 F.2d 1272 (Mont. 1996). This Court rejects the claim for the reasons set forth in the above-cited authorities.

The petitioner's sixth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Seventh Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 8)

In his seventh claim for relief Richardson asserts that his "constitutional rights" were violated by this Court's refusal to submit an instruction to the jury regarding the law of parole eligibility.

At the conclusion of the punishment phase of the trial counsel for Richardson submitted "Defendant's Special Requested Charge On Punishment No. Six." That charge stated as follows:

> "During your deliberations as to the answers to be given to the special issues, you are not to consider how much of his sentence the Defendant would be required to serve before being released on parole, if his punishment is assessed at life imprisonment. You are instructed, however, that under the law, a person who is serving a sentence of life imprisonment for the offense of Capital Murder may not be considered for release on parole until his actual calendar time served, without consideration of good conduct time, is twenty (20) years." (T.R. I-218)

The trial judge denied the requested charge after considering argument from Richardson's trial counsel. (T.R. VII-281, 282)

The Court of Criminal Appeals has consistently and uniformly held that parole eligibility instructions are not required at the punishment phase of a capital murder trial. Morris v. State, 940 S.W.2d 610 (Tex. Crim. App. 1996); Green v. State, 934 S.W.2d 92 (Tex. Crim. App. 1996); Martinez v. State,,924 S.W.2d 693 (Tex. Crim. App. 1996);

Smith v. State, 898 S.W.2d 838 (Tex. Crim. App. 1995). The requested instruction was properly denied.

Petitioner's seventh claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Eighth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 85)

In his eighth claim for relief Richardson claims that this Court erroneously denied a motion to suppress and allowed for the admission into evidence the product of an illegal search.

This issue was raised on direct appeal and decided adversely to the petitioner. Richardson v. State, 744 S.W.2d at pp. 84, 85. As a result it cannot form the basis for relief on a post-conviction writ of habeas corpus. Ex parte Acosta, supra.

The petitioner's eighth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Ninth Claim For Relief.
(Petitioner's Writ Of Habeas Corpus, pg. 90)

In his ninth claim for relief Richardson avers that this Court violated his "constitutional rights" by limiting his cross-examination of a State's witness (Rhonda Bearden) and by refusing to compel the testimony of two witnesses for the defense (the victims of an extraneous offense committed by Bearden).

This issue was raised and rejected on direct appeal. Richardson v. State, 744 S.W.2d at pgs. 78, 79, 80. Therefore,

it cannot form the basis for relief on a post-conviction writ of habeas corpus. Ex parte Acosta, supra.

The petitioner's ninth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Tenth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 95)

In his tenth claim for relief the petitioner asserts that his appearance in leg shackles, visible to the jury, violated his right to the presumption of innocence and a fair and impartial jury.

The scheduling order entered by this Court on December 30, 1996, granted the petitioner's request for a hearing on this issue. The petitioner presented no evidence in support of this contention at the hearing on his petition for writ of habeas corpus.

In his pleadings Richardson cites to the only two occasions in the record where shackles are mentioned. Because of their brevity the Court will quote them in their entirety. On the morning of September 2, 1981, the trial Court conducted a hearing on a motion to suppress evidence. This hearing was conducted prior to the initiation of the voir dire process. (T.R. II-105 thru 145) At the conclusion of that session of Court the following unfolded:

> MR. CAZIER: Judge, the one last thing is this. As Your Honor, knows, I would like the record to reflect the defendant has appeared at all pre-trial hearings in leg shackles. We move the Courts, request the Court that those shackles be removed at all times when the jury panel and jury is in the hallway or in this Court. that the defendant not be required to be in the view of

the jury in handcuffs and specifically in leg shackles or leg irons as he is now wearing.

THE COURT: It is the policy of this Court and my bailiffs are very efficient in carrying out those instructions, that no defendant be displayed before jurors in any sort of handcuffs or shackles. And I'm satisfied that they will continue to see that is done.

I know that there are particular security episodes in the history of this defendant that warrant the sheriff taking unusual precautions. I'm not going to impede that in any way, but my bailiffs will see that the defendant is either brought in before the jury is around or after the jury is around so they will not be viewed. They will not view him in any sort of restraint.

MR. HINDMAN: (COURT BAILIFF) Chief Talbert has placed him in the hands of two other officers throughout this and that's the reason we have two others and they give him official transportation and remain with him the whole time. They are here. This best be directed to them.

THE COURT: You have heard the instructions.

SHERIFF'S DEPUTIES: We'll bring them earlier and remove them.

THE COURT: You can bring him earlier and make sure it's well before any jurors are around, and Joe and Bob can tell you where jurors are because we will be having a few of them up in our jury room from time to time. But I think the request is appropriate. Now, anything further? All right, we'll recess.
(T.R. II-145, 146, 147) (emphasis added)

The record reflects that the Court granted the petitioner's request not to appear before the jury (or potential jurors) in leg shackles.

The only other reference to this issue occurred the following day during the course of the individual voir dire process. After one venireman was stricken by the prosecution, and prior to another entering the courtroom the following unfolded:

> MR. CAZIER: If the Court please. I would like the record to reflect that during the recess the sheriff deputy has applied a large leg brace to the right leg of Mr. Richardson placed underneath his trousers and that he's reported to me that he's very uncomfortable.
>
> It cuts down on the circulation of the blood in his leg and that he cannot stand and he cannot walk other than straight legged. We object to his being required to wear this.
>
> THE COURT: My understanding on a brace such as this keeps the knee from bending, but it does not restrict circulation and cannot be seen or observed by anyone unless the defendant tries to move around. At this stage of the trial I will not require the sheriff to remove it. You may bring the next juror, please.
>
> MR. CAZIER: Note our exception.
>
> (T.R. 111-204)

The remainder of the trial was conducted without further mention of the leg brace.

The petitioner argues that the record supports a conclusion that he was denied his right to a fair trial, because he was denied his right to the presumption of innocence. The

Court, on the basis of the record before it, concludes just the opposite. The first time the issue arose was prior to the jury selection process at which time petitioner objected to appearing before the jury in shackles. This Court granted the request of petitioner's trial counsel and ordered that petitioner not appear in shackles before the jury or jury panel. No evidence was brought forth to demonstrate that the order of the Court was not complied with during the course of the trial. The second instance in which the issue of restraints arose concluded with the Court's observation that the leg restraint was not visible to anyone. Trial counsel did not refute the Court's observation but merely complained that the device was under petitioner's trousers and restricting his circulation.

After the trial was concluded petitioner filed a motion for new trial alleging, in part, that he was "denied a fair and impartial trial by virtue of the extraordinary security precautions taken during the course of the trial." (T.R. I-230) In support of that motion petitioner's trial counsel produced the testimony of his court-appointed investigator. (T.R. VII-343) The investigator related the following vis-a-vis the leg restraint:

> Q. During the course of the trial was the defendant, Mr. Richardson, required to wear a leg brace?
>
> A. Yes, he was.
>
> Q. Okay, I wonder if you could describe that brace for the record, please?
>
> A. The leg brace seemed like when somebody is injured or something. you wrap around — it was wrapped around his knee not allowing him to walk at a normal pace.
>
> Q. How did he walk?

A. Awkward like he was crippled or something like that.

Q. Was he able to bend his leg at the knee on the leg that he had the brace on?

A. No, he wasn't.

Q. Was the brace visible through his clothing, at least to the extent that you could see the outlines of the brace under his pants?

A. It was bulky enough so you could see it through the outline of the pants.

Q. And was Mr. Richardson required to wear that leg brace?

A. At all times.

Q. At all times during the trial?

A. That's correct.

Q. Okay. (T.R. VII-345, 346)(emphasis added)

The motion for new trial testimony is devoid of any evidence that any member of the jury saw the outline of the leg brace. Furthermore, the testimony at the motion of new trial contains nothing that even remotely suggests that members of the jury violated the instructions of the Court and based their verdict on matters not in evidence.

In the absence of a showing that members of the jury were aware that petitioner was wearing a leg brace, and that the device was a security measure, the petitioner has not met his burden of demonstrating that his right to the presumption

of innocence was violated. Long v. State, 823 S.W.2d 259 (Tex. Crim. App. 1991), cert. den. _____ U.S. _____, 112 S.Ct. 3042, 120 L.Ed.2d 910 (1992); Caraway v. State, 550 S.W.2d 699 (Tex. Crim. App. 1977); Brown v. State, 877 S.W.2d 869 (Tex. App. San Antonio, 1994).

The petitioner's tenth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Eleventh Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 97)

In his eleventh claim for relief Richardson asserts that his right to a fair trial was violated by this Court's admission into evidence "irrelevant and inflammatory extraneous offense and victim impact evidence."

The petitioner's eleventh claim for relief is substantively divided into two distinct issues the admission of victim impact evidence and what petitioner characterizes as extraneous acts of misconduct. The nature of the claims requires this Court address this issues as separate and distinct claims. The claim regarding "victim impact testimony" will be addressed first.

The victim impact evidence of which the petitioner complains revolves around the fact that the jury became aware during the course of the trial that, in addition to shooting and killing the complainant (John Ebbert) the petitioner at the same time, in the same place and in the same manner had shot to death the complainant's companion/associate (Howard Powers). The petitioner asserts that in allowing for the admission of this evidence this Court erroneously allowed for the admission of "victim impact" testimony. The petitioner's claim must fail for two reasons.

First, with respect to the evidence admitted at the punishment phase, there exists no constitutional prohibition against the admission of "victim impact" testimony. Ford v. State, 919 S.W.2d 107 (Tex. Crim. App. 1996). With respect to the use of this evidence during the course of the guilt-innocence phase of the trial, the murder of Powers was inextricably intertwined with the simultaneous murder of Ebbert, hence admissible as "contextual" evidence. See: Lawton v. State, 913 S.W.2d 542 (Tex. Crim. App. 1995); Nelson v. State, 864 S.W.2d 496 (Tex. Crim. App. 1993); Camaco v. State, 864 S.W.2d 524 (Tex. Crim. App. 1993); Lockhart v. State, 847 S.W.2d 568 (Tex. Crim. App. 1992).

Richardson also claims that error arose at various times during the trial when evidence was adduced which tended to show that he was in San Antonio "pimping." This evidence was brought forth through the testimony of the prostitutes who were the object of the "pimping." Without belaboring the details it is sufficient to note that Richardson's occupation and its ramifications regarding his relationship with his clients (Franklin, Bearden, and Laursen) was admissible both as contextual evidence, and as proof of motive. See: Gosch v. State, 829 S.W.2d 775 (Tex. Crim. App. 1991), cent. den._____ U.S. _____, 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993).

The petitioner's eleventh claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Twelfth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 104)

In his twelfth claim for relief Richardson claims that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated by the

instructions submitted to the jury at the punishment phase of the trial.

At the conclusion of the punishment phase the Court submitted the following instruction, which forms the basis of Richardson's allegation:

> You will answer each of these special issues either "yes" or "no."
>
> In order for the jury to answer a special issue "yes" the jurors must unanimously concur that the answer is "yes" beyond a reasonable doubt regarding that special issue.
>
> Any juror who entertains a reasonable doubt that the answer is "yes" as to a special issue shall vote "no" in the jury deliberations regarding that special issue. If ten or more jurors vote "no" in the jury deliberations as to a special issue, then the answer of the jury is "no" regarding that special issue. (T.R. I-221, 222)

The petitioner advances the argument that the jury should have been informed that a single juror had the ability to answer one of the special issues "no" hence mandating a hung jury and a life sentence rather than a sentence of death. The argument asserts that the failure to inform the jury of this aspect of the law amounts to a violation of the Eighth Amendment. The petitioner's argument has been consistently rejected by the Court of Criminal Appeals. Johnson v. State, _____ S.W.2d _____ (No. 78,046, Tex. Crim. App., April 30, 1997); Shannon v. State, 942 S.W.2d 591 (Tex. Crim. App. 1996); Eldridge v. State, 940 S.W.2d 646 (Tex. Crim. App. 1996); Rousseau v. State, 855 S.W.2d 666 (Tex. Crim. App. 1993).

The petitioner's twelfth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Thirteenth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 108)

In his thirteenth claim for relief Richardson claims that he. was denied his right to due process of law because the charge of the Court, at the guilt-innocence phase of the trial, erroneously defined the culpable mental state necessary for the offense of Capital Murder.

At the conclusion of the guilt-innocence phase of the trial, the trial judge submitted an instruction to the jury which included the following definition of "intentionally."

> A person acts "intentionally," or with intent, with respect to the nature of his conduct or to a result of this conduct when it is his conscious objective or desire to engage in the conduct or cause the result. (T.R. I-90)

The charge also contains the following instructions:

> Before you would be warranted in convicting the defendant of capital murder, you must find beyond a reasonable doubt not only that on the occasion in question that the defendant, was engaged in the commission of the offense of robbery, of John G. Ebbert, but also during the commission of the robbery the defendant shot the deceased with a gun with the intention of thereby killing John G. Ebbert.
>
> Unless you find from the evidence beyond a reasonable doubt that the defendant, on the occasion

in question, specifically intended to kill the said deceased when he shot John G. Ebbert, if he did shoot John G. Ebbert, you cannot convict him of the offense of capital murder.

* * * * * * *

Now if you find from the evidence beyond a reasonable doubt that on or about March 31, 1979, in Bexar County, Texas, the defendant, Miguel A. Richardson, did intentionally or knowingly cause the death of John G. Ebbert, by shooting the said John G. Ebbert with a gun, and the said Miguel A. Richardson, did then and there intentionally cause the death of the said John G. Ebbert while in the course of committing or attempting to commit robbery of John G. Ebbert, you will find the defendant guilty of capital murder. (T.R. I-191) (emphasis added)

At the conclusion of the evidentiary portion of the guilt-innocence phase of the trial no objection was lodged to the charge on the grounds now alleged as reversible error. (T.R. VI-202 thru 206)

Petitioner now asserts that the charge is erroneous because the definition of "intentionally" is not limited to "causing the result" but erroneously includes "engaging in the conduct" language. See: Cook v. State, 884 S.W.2d 485 (Tex. Crim. App. 1994)(Error not to limit the definition of culpable mental states in result-type offenses to the result of the defendant's action, to the exclusion of the conduct itself).

In the absence of a timely and specific objection to the charge a reversal is not mandated unless the accused suffered "egregious harm." Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984). Egregious harm has been defined as charge

error which denies the defendant a "fair and impartial trial." Arline v. State, 721 S.W.2d 348 (Tex. Crim. App. 1986).

The charge in question did not deprive the petitioner of a fair and impartial trial. The application portion of the charge mandated that the jury find a specific intention to kill and did not authorize a conviction for engaging in the conduct of firing the weapon. Moreover, an examination of the arguments following the guilt-innocence phase reveals that, at no time, did counsel for either side make reference to the Court's definition of the culpable mental state. (T.R. VI-212 thru 246) Under the facts of this case Richardson did not suffer egregious harm. Patrick v. State, 906 S.W.2d 481 (Tex. Crim. App. 1995); Hughes v. State, 897 S.W.2d 285 (Tex. Crim. App. 1994); Turner v. State, 805 S.W.2d 423 (Tex. Crim. App. 1991); Cantu v. State, 842 S.W.2d 667 (Tex. Crim. App. 1992).

The petitioner's thirteenth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Fourteenth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 110)

In his fourteenth claim for relief Richardson asserts that he was denied effective assistance of counsel at trial and on appeal.

Richardson details three putative failures on the part of trial counsel:

i) Counsel failed to pursue exculpatory evidence (petition, pg. 111);

ii) Counsel failed to secure a fair and impartial jury (petition, pg. 114);

iii) Counsel erred during course of trial (petition, pg. 118).

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in the case of Strickland v. Washington:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
> Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

The Strickland analysis has been expressly adopted by the Court of Criminal Appeals. Butler v. State, 872 S.W.2d 227 (Tex. Crim. App. 1984); Holland v. State, 761 S.W.2d 307 (Tex. Crim. App. 1988); cert. den. 489 U.S. 1091, 109 S.Ct. 1560, 103 L.Ed.2d 863 (1989); Hernandez v. State, 726 S.W.2d 53 (Tex. Crim. App. 1986).

In order to establish that his trial counsel's performance was constitutionally infirm, the defendant must demonstrate the counsel's representation fell below an

objective standard of reasonableness. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Chambers v. State, 903 S.W.2d 21 (Tex. Crim. App. 1995); Banda v. State, 890 S.W.2d 42 (Tex. Crim. App. 1994), cert. den. _____ U.S. _____, 115 S.Ct. 2253, 132 L.Ed.2d 260 (1995); Belyeu v. Scott, 67 F.3d 535 (5th Cir. 1995); cert. den. _____ U.S. _____, 116 S.Ct. 1438, 134 L.Ed.2d 559 (1996); Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995). In order to defeat this presumption the defendant bears the burden of proof and must defeat a strong presumption that the performance of trial counsel falls within a wide range of reasonable legal assistance. Patrick v. State, 906 S.W.2d 481 (Tex. Crim. App. 1995); Garcia v. State, 887 S.W.2d 862 (Tex. Crim. App. 1994), cert. den. _____ U.S. _____, 115 S.Ct. 1368, 131 L.Ed.2d 223 (1995); Duff-Smith v. Collins, 973 F.2d 1175 (5th Cir. 1992), cert. den. _____ U.S. _____ 113 S.Ct. 1958, 123 L.Ed.2d 455 (1993); Black v. Collins, 962 F.2d 394 (5th Cir. 1992), cert. den. 504 U.S. 992, 112 S.Ct. 2983, 119 L.Ed.2d 601 (1993). Reviewing courts are required to review the performance of counsel from counsel's perspective at the time he acted (or failed to act) rather than through the use of hindsight. Ex Parte Kunkle, 852 S.W.2d 499 (Tex. Crim. App. 1993), cert. den. _____ U.S. _____, 114 S.Ct. 122, 126 L.Ed.2d 87 (1994); Solis v. State, 792 S.W.2d 95 (Tex. Crim. App. 1990); Williams v. Scott, 35 F.3d 159 (5th Cir. 1994); cert. den. _____ U.S. _____, 115 S.Ct. 959, 130 L.Ed.2d 901 (1995); Williams v. Collins, 16 F.3d 626 (5th Cir. 1994). A reviewing Court is not entitled to speculate as to the reasons why trial counsel acted as he did, rather a reviewing court must presume that the actions taken were taken as part of a strategic plan for representing the client. Jackson v. State, 877 S.W.2d 768 (Tex. Crim. App. 1994).

In reviewing claims of ineffective assistance of counsel, the standard to be applied is whether an accused received "reasonably effective" assistance. Brewer v. State,

649 S.W.2d 628 (Tex.Crim. App. 1976); Ex Parte Gallegol, 551 S.W.2d 510 (Tex. Crim. App. 1974). The sufficiency of assistance is to be gauged by the totality of representation and the fact that another attorney may have pursued a different tactic at trial is insufficient to prove a claim of ineffective assistance of counsel. King v. State, 649 S.W.2d 42 (Tex. Crim. App. 1983); Boles v. State, 598 S.W.2d 274 (Tex. Crim. App. 1970). Isolated instances of error on the part of trial counsel will not support a claim of ineffective assistance of counsel. Archie v. State, 615 S.W.2d 762 (Tex. Crim. App. 1981); Riles v. State, 595 S.W.2d 858 (Tex. Crim. App. 1980); Earwin v. State, 582 S.W.2d 794 (Tex. Crim. App. 1979). In reviewing the question of whether counsel was not "reasonably effective," the deficient performance prong of the Strickland test, the reviewing court is required to determine whether counsel's alleged errors were so egregious that counsel was not functioning in a manner envisioned by the Sixth Amendment. Gosch v. State, supra.

The prejudice which comprises the second component has also been defined. The Court states that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, supra, at S.Ct. 2069, 2070. In sum, if no prejudice had been demonstrated, then the Sixth Amendment right to counsel has not been violated. Duff-Smith v. Collins, supra.

The accused has the burden of affirmatively proving prejudice. Strickland v. Washington, supra, at S.Ct. 2067. The prejudice envisioned by Strickland require a showing or more than an error which might have a conceivable effect on the outcome of the trial. Strickland v. Washington, supra, at S.Ct. 2067.

The Supreme Court has clarified what constitutes that prejudice prong of Strickland. In Lockhart v. Fretwell, _____

U.S. _____, 113 S.Ct. 838, 112 L.Ed.2d 180 (1993) the Court held that in order to establish the second prong of Strickland an accused must demonstrate that counsel's deficient performance renders the result of the trial "unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, id., at S.Ct. 844. The proper analysis is one which focuses, not on the outcome of the proceedings, but rather on the fairness and reliability of the process in which guilt is determined. Lockhart v. Fretwell, id., at S.Ct. 842, 843. Vuong v. Scott, 62 F.2d 673 (5th Cir. 1995), cert. den. _____ U.S. _____, 116 S.Ct. 557, 133 L.Ed.2d 458 (1995); Armstead v. Scott, 37 F.2d 202 (5th Cir. 1994); cert den. _____ U.S. _____, 115 S.Ct. 1709, 131 L.Ed.2d 570 (1995).

Finally, in analyzing a claim of ineffectiveness, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland v. Washington, supra, at S.Ct. 2069, 2070. Put in other words, this Court is entitled to review only the second prong of the two-pronged test in resolving this issue. Moreover, if it is easier to dispose of an ineffectiveness claim solely on the issue of prejudice to the appellant, that is the approach that should be followed. Strickland v. Washington, supra, at S.Ct. 2070.

Findings Of Fact And Conclusions Of Law On Petitioner's Three Claims Of Ineffectiveness

A.

In his first claim of ineffectiveness Richardson contends that his trial counsel was ineffective for failing "to pursue exculpatory evidence."

The petitioner's sole complaint under this particular claim is that trial counsel (Alan Cazier) failed to secure the testimony of a witness by the name of Laura Susan Vit. The petitioner makes reference to an exhibit attached to his petition (Exhibit H) and asserts that if the statement is true it could have provided him with evidence which was exculpatory in nature.

The exhibit which petitioner refers to is not before this Court for purposes of passing on the merits of Richardson's claim. Petitioner asked for and was granted by this Court a hearing on his claim of ineffective assistance. At no time during the course of the hearing did petitioner attempt to offer Exhibit H into evidence. Moreover, at no time did this Court indicate, explicitly or implicitly, that it would consider any of the exhibits attached to the petition as substantive evidence for purposes of the hearing. See generally: Art. 11.071, § 9(a), Tex. Code Crim. Proc. Ann. (Vernon Supp. 1997).

Furthermore, Richardson asserts that if the statement by Vit is true than it would constitute potential exculpatory evidence. There are two shortcomings in Richardson's argument. First, because he has the burden of proof in this proceeding, he was required to demonstrate that the statement was true, not that it might have been true. Secondly, even if the statement is true it presents a situation in which it could prove to be inculpatory in certain respects. More particularly, it arguably bolsters the State's theory that Richardson attempted to gain entry to Vit's room prior to the shooting of Powell and Ebbert, which occurred shortly thereafter and a short distance away.

Assuming, without deciding, that Cazier's failure to obtain the testimony of Vit constitutes ineffective assistance of counsel, nevertheless Richardson has not demonstrated that Vit's failure to testify rendered the guilty verdict unreliable or the guilt-innocence phase of the trial fundamentally unfair. In

short, petitioner has not met his burden of proving that he was prejudiced as defined by law. See: Johnson v. Scott, 68 F.3d 106 (5th Cir. 1995), cert. den., _____ U.S. _____, 116 S.Ct. 1358, 134 L.Ed.2d 525 (1996).

B.

In his second claim of ineffective assistance, Richardson asserts that trial counsel "failed to secure a fair and impartial jury." Commingled with this claim are various claims relating to the failure of appellate counsels.[5] The petitioner cites to seven purported failures on the part of his counsel.

First, Richardson complains that counsel failed to appeal the denial of his pre-trial motion for change of venue. Prior to trial, counsel failed a written "Motion for Change of Venue." (T.R. I-39 thru 43) A hearing was conducted on that motion on August 13, 1981. (T.R. II-32 thru 71) In support of his motion counsel presented the testimony of six witnesses. At the conclusion of the hearing the motion was denied. (T.R. II-71) The denial of the motion was not raised as a ground of error on direct appeal. The petitioner claims that the failure to raise the issue on appeal amounts to ineffective assistance of counsel.

The petitioner has failed to demonstrate that this Court's ruling of August 13, 1981 was erroneous, as a result ineffectiveness has not been shown. In order to demonstrate that the ruling of this Court was erroneous and constituted reversible error it must be shown that the ruling constituted an abuse of discretion. Willingham v. State, 897 S.W.2d 351 (Tex. Crim. App. 1995). The petitioner has failed to so demonstrate. As a result he has failed to demonstrate that he

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5 Alan Cazier served as both trial and appellate counsel.

was prejudiced by counsel's failure to raise the issue on direct appeal. See generally: Powell v. State, 898 S.W.2d 821 (Tex. Crim. App. 1994); Narvaiz v. State, 840 S.W.2d 415 (Tex. Crim. App. 1992).

In his second claim of ineffectiveness, in this context, Richardson asserts that trial counsel erred by failing to obtain a sequestered jury so as to avoid improper media exposure during the trial. In support of his claim Richardson asserts that he "will show at a hearing" that the jury was exposed to a "great deal of prejudicial media coverage" during the trial. No such evidence was brought forth during the course of the hearing.

Included in the Court's written instructions to the jury was the following admonishment:

> During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you.

Moreover, prior to the commencement of testimony, the trial judge orally admonished the jury in the following fashion:

> If there is anything to any of the news media about the case you are specifically instructed not to read it, not to watch anything on television about it, not to listen to anything on the radio about it. (T.R. V-11)

In the absence of any evidence to the contrary, this Court will presume that the jurors abided by these instructions and did not expose themselves to, or consider evidence of, reports in the media (if any such reports were ever made). In the absence of such proof Richardson has failed to meet his

burden of demonstrating that counsel was ineffective for failure to pursue his request for sequestration of the jury.

Petitioner also claims. that counsel was ineffective for failing to object to the State's raced-based peremptory strikes, and raise that issue on direct appeal. See: Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 260 (1986). The effectiveness of trial counsel is gauged against the law as it existed as the time of trial. Lockhart v. Fretwell, supra. At the time of petitioner's trial (June of 1981) the Supreme Court had not yet held that a case of race-based discrimination in the use of peremptory strikes could be shown on the basis of strikes utilized at a single trial. This holding did not arise until 1986 when Batson was decided. Inasmuch as this "right" did not arise until almost five years after the petitioner's trial, the petitioner has not shown that the failure to object was error on the part of Cazier. Lockhart v. Fretwell, supra.

It is also noteworthy that the petitioner is seeking a new trial on the grounds that the equal protection rights of the venireman were purportedly violated through the State's use of race-based peremptory strikes. See generally: Powers v. Ohio, 409 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); J.E.B. v. Alabama, 511 U.S. , 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). The vehicle which petitioner is attempting to utilize in remedying this alleged wrong, a post-conviction writ of habeas corpus, is designed to grant new trials to individuals who can demonstrate that their conviction was obtained in violation of their constitutional rights. See generally: Ex Parte Sodberry, 864 S.W.2d 541 (Tex. Crim. App. 1993). Assuming arguendo that the State violated the holding of Batson in the exercise of its peremptory strikes, that fact does not translate into a demonstration that the conviction was obtained, in such a fashion as to violate the petitioner's rights under the Constitution.

Lastly, assuming again that the absence of an objection to the State's peremptory strikes constituted ineffective assistance of counsel (the first prong of Strickland) petitioner has not alleged, or proven, that he was prejudiced in the manner envisioned by Lockhart. Put in other words, it has not been shown that by allowing the jury which ultimately heard the case to render its verdict, as opposed to a jury that would have passed muster under Batson, that the result of the trial was rendered fundamentally unfair or unreliable. In the absence of such a showing the petitioner has not shown the requisite prejudice as mandated by Strickland. See: Lockhart v. Fretwell, supra.

Petitioner makes reference to counsel's failure to appeal the various rulings of this Court made during the course of jury selection. (petition, pg. 116) The petitioner's claims, in this regard, must fail for two reasons.

First an examination of the record reveals that the rulings of the Court were not erroneous, hence the failure to raise those issues on appeal does not constitute ineffective assistance.

An examination of the voir dire questioning of Ms. Hinton reveals that after initialing indicating that she could not envision a situation in which a life sentence would be an appropriate sentence for the offense of capital murder, the prosecutor and trial judge rehabilitated the venireperson. (T.R. III-131 thru 141) Ultimately the venireperson indicated that she understood the sentencing scheme and would base her verdict only upon the evidence presented. T.R. III-136) She also indicated that despite her personal approval of the death penalty in the abstract, she would nevertheless require the prosecution to prove the special issues beyond a reasonable doubt. (T.R. III-140, 141)

A number of principles are particularly applicable to the petitioner's claim. In reviewing a claim that a trial judge erroneously denied a defendant's challenge for cause a reviewing court is required to give great deference to the trial judge's ruling after reviewing the record as a whole. Satterwhite v. State, 858, S.W.2d 412 (Tex. Crim. App. 1993). In reviewing challenges for cause an appellate court may not reverse the ruling of the trial Court absent a showing that the lower court abused its discretion. Satterwhite v. State, supra. A trial judge does not abuse its discretion by refusing to grant a challenge for cause lodged against a venireperson who vacillates in his/her response to questions. Satterwhite v. State, supra. That is precisely what occurred with respect to Ms. Hinton.

Under the tenets of review outlined above the petitioner has not demonstrated that counsel for petitioner was ineffective for failure to raise this claim on direct appeal.

The same equation applies with equal force to the contentions raised regarding the trial Court's denial of petitioner's challenge for cause on venireperson Sip (T.R. III-321, 322, 323) venireperson Cunningham (T.R. IV-47, 48) and venireperson Zaiontz (T.R. IV-200, 201).

With respect to venireperson Johnson (T.R. IV-351 thru 378) no appealable issue was raised because no challenge for cause was lodged against Johnson. See: Garcia v. State, 887 S.W.2d 862 (Tex. Crim. App. 1994).

The petitioner also complains of trial counsel's decisions during the course of voir dire. Initially he claims that he was denied effective assistance because trial counsel failed to make inquiry of the venirepersons as to whether his race (black) would impact on their deliberations. In the absence of some proof that some of the jurors who ultimately sat on the jury were adversely influenced by racial

considerations this Court will once again engage in a presumption that the jury followed their instructions based on their verdict on the evidence. Stated in the alternative, petitioner has failed to meet his burden of proving that what was not asked of the venire, was not asked for a reason related to the trial counsel's strategic decision making process. The same holds true with respect to counsel's non-uniform use of inquiries regarding the terms intentional and deliberate. Lastly, trial counsel's decision not to exercise a peremptory strike against venireperson Mauricio was inherently one of strategy. (T.R. 111-356)

C.

In his final category of ineffective assistance of counsel the petitioner concludes with a lengthy "laundry list" of purported failure of trial counsel. He claims deficient performance in i) failing to object to the opening statement of the prosecutor, ii) failing to raise on appeal the erroneous admission of extraneous misconduct, iii) failing to raise on appeal the erroneous admission of hearsay, iv) failing to raise on appeal the erroneous use of leading questions, v) failure to object to the violation of rule of sequestration, vi) making a deficient closing argument, vii) failing to object to the prosecutor's closing argument, viii) failure to complain an appeal regarding the denial of certain requested jury instructions, ix) failure to adequately examine and cross-examine witnesses.

Each and every one of these claims is wholly conclusory and not supported by any authority. As a result petitioner has failed in his burden of proof on the first prong of Strickland. Moreover, the petitioner has not argued or demonstrated that these purported failures rendered the proceedings unfair or the result unreliable. As a result, the petitioner has not sustained his burden of proof on the second prong of Strickland.

The petitioner's fourteenth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Fifteenth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 121)

In his fifteenth and final point of error Richardson claims that the cumulative effect of the putative errors described in his petition amount to a violation of his right to due process of law.

The Court has reviewed petitioner's claims for relief and found them lacking in merit. An assertion of "cumulative error" presents nothing for this Court on the Court of Criminal Appeals to review. Stoker v. State, 788 S.W.2d 1 (Tex. Crim. App. 1989).

The petitioner's final claim for relief is without merit.

CONCLUSION OF LAW

Applicant has failed to demonstrate any grounds which would entitle him to relief in the form of a post-conviction writ of habeas corpus. It is recommended that this Applicant for habeas corpus relief be denied.

ORDERS OF THE COURT

1) The District Clerk of Bexar County, Texas is hereby ordered to prepare a copy of this. document, together with any attachments and forward the same to the following persons by mail or the most practical means:

a) The Court of Criminal Appeals
Austin, Texas 78711

b) Mr. Steven C. Hilbig
Criminal District Attorney
300 Dolorosa, Suite 5072
Bexar County Justice Center
San Antonio, Texas 78205

c) The Office of Dan Morales
Attorney General of Texas
Enforcement Division
Capitol Station
Austin, Texas 78711

d) Miguel Richardson
Route 6
Huntsville, Texas 77343

e) Daniel M. Lane
1500 NCNB Plaza
300 Convent St.
San Antonio, Texas 78202

f) Steven Rosenfeld
1285 Avenue of the Americas
New York, New York 10019-6064

SIGNED, ORDERED, and DECREED this 1st day of October, 1997.

/s/ Mary Roman
JUDGE MARY ROMAN

CCA Clerks System v.2.0 - Active Files Party # 1 of 5

PDR/Case Number [68,934] Docketed (01/19/82)
Petitioner [APPELLANT]
Style [RICHARDSON, MIGUEL A.]
v [ ]
Offense [CAPITAL MURDER]
[ ] Type [19.03
Punishment [DEATH]
COA Case Number [ ] COA Opinion [
Tr Ct ID Number [320150175] Tr Ct Case # [81-CR-1548]
County [Bexar] Court Name [175TH DISTRICT COURT]
Tr Ct Judge [PRESTON H. DIAL, JR.] Writ [ ]
Contents [TR & SF 6-30-82, A.BR 9-20-82, S.BR 12-6-82, PS.BR 12-27-82]

Code	Name of Party	Person Name	Code
APP	RICHARD,	Rosenfeld, Stephen B.	ATT
APP	MIGUEL A.	Cazier, Allen F.	ATT
DCT		Judge Presiding,	CRT
DCT		Garcia, David J.	DCK
STA		Hilbig, Steven C.	DAT

A)rchive C)ase E)vent M)emo O)pinion P)erson S)ettings R)emarks

Date Printed:
November 28, 1994 Time: 11:43:40
Section 2

Events, Calendars, and Opinion Summary

PDR/Case Number 68,934 Date Filed: 01/19/82
Style: RICHARDSON, MIGUEL A.

Event Date	Post Proc	Event	Descr	Disp	Motion Num	Oral	Disp Code	Remarks 1/Remarks 2
01/19/82		DP BEGIN						
01/19/82		EXT SF FILED	APP					
01/19/82		EXT SF DISP	APP	GRANTED				
06/30/82		TR & SF FILED						
09/20/82		BRIEF FILED	APP					
12/06/82		BRIEF FILED	STA					
12/06/82		SET FOR SUBMIS						
01/26/83		SUBMITTED						
10/28/87		OPINION ISSD		AFFTC			Y	
11/09/87		STAY MANDAT MOT TO	APP	FILED				
11/09/87		REHEAR FILED	APP					
11/25/87		STAY MANDAT MOT TO	APP	GRANTED				MANDATE STAYED FOR 60 DAYS
11/25/87		REHEAR DISP	APP	DENIED			Y	
02/23/88		MANDATE ISSD						
07/05/89		WRIT OF CERT USSC	APP	GRANTED				CERT GRANTED - CASE IS REMANDED TO CCRA FOR FURTHER CONSIDERATION IN LIGHT OF PENRY VS LYNAUGH
08/08/89		EXTRA REMARKS						MANDATE FROM USSC RECD AND FILED
08/15/89		REINSTATED	APP					
08/15/89		SET FOR SUBMIS						
08/15/89		ORDER FILED						A BR DUE 9-15-89, S BR DUE 10-2-89
08/25/89		RESET						CASE IS RESET FOR 1-17-90
01/17/90		SUBMITTED						
06/21/90		EXTRA REMARKS						LTR FROM J BERCHELMAN WITHDRAWING VOLUNTARILY FROM CASE "NOT PARTICIPATING" CERT COPIES OF LTR MAILED TO ATTY, DA, JUDGE
06/12/91		OPINION ISSD		AFFIRM	Y			
06/27/91		REHEAR FILED	APP					
09/18/91		REHEAR DISP	APP	DENIED	Y			
10/10/91		STAY MANDAT MOT TO	APP	FILED				
10/10/91		STAY MANDAT MOT TO	APP	GRANTED				MANDATE IS RECALLED & STAYED UNTIL 12-17-91

Date Printed:
November 28, 1994 Time: 11:43:41
Section 2

Events, Calendars, and Opinion Summary

PDR/Case Number 68,934

Date Filed: 01/19/82

Style: RICHARDSON, MIGUEL A.

Event Date	Post Proc	Event	Descr	Disp	Motion Num	Oral	Disp Code	Remarks 1/Remarks 2
12/18/91		STAY MANDAT MOT TO	APP	FILED				2ND MOT/STAY MANDATE FILED
12/18/91		STAY MANDAT MOT TO	APP	GRANTED				MANDATE STAYED UNTIL DAY OF USSC RULES ON APELLANT'S WRIT OF CERT
12/27/91		WRIT OF CERT USSC	APP	FILED				
06/30/93		WRIT OF CERT USSC	APP	GRANTED				WRIT OF CERT IS GRANTED ON 6-28-93 (IF NO MRH IS FILED - MANDATE WILL ISSUE BY USSC IN ABOUT 25 DAYS)
08/02/93		EXTRA REMARKS						MANDATE FROM USSC - JUDGMENT OF CCRA IS VACATED & THE CASE IS REMANDED TO THE COURT IN LIGHT OF JOHNSON V TEXAS
08/02/93		REINSTATED	APP					
08/19/93		SET FOR SUBMIS			N			NOTICE OF SETTING MAILED TO ALL PARTIES IN LETTER FORM
10/01/93		SUPP BR FILED	STA					
10/11/93		SUPP BR FILED	APP					
10/27/93		SUBMITTED			N			
06/01/94		OPINION ISSD		AFFIRM		Y		
06/21/94		REHEAR FILED	APP					O K TO FILE. GOOD POSTMARK
07/06/94		WORKUP REH COMPLET						
09/21/94		REHEAR DISP	APP	DENIED		Y		
10/06/94		STAY MANDAT MOT TO	APP	FILED				
10/06/94		STAY MANDAT MOT TO	APP	GRANTED				GRANTED FOR 90 DAYS

Calendar	Date Set	Reason Set	Loc	Remarks
MANDAT	12/20/94	MANDATE DUE	CLK	

Event Date	Post Proc	Event	Descr	Disp	Motion Num	Oral	Disp Code	Remarks 1	Remarks 2

Court of Criminal Appeals - Case Opinion

PDR/Case Number 68,934 Opinion Date: 06/01/94

Style: RICHARDSON, MIGUEL A.

Proc: Event: OPINION ISSD Desc.: Disp.: AFFIRM

Disposition Without Written Opinion: N

Author Of Majority Opinion: MJM

Original: N
Granting Rehearing: N Denying Rehearing: N Other: Y

Concurring:
Dissenting: SNC
Concurring & Dissenting:
Not Participating: BV

Per Curiam: N Published: Y West Publishing Cite:

======= Is This The Ruling That DECIDED The Case ? N ==========

Remarks: AFFIRMED ON REMAND FROM THE UNITED STATES SUPREME COURT-
OPINION PRESIDING JUDGE MC CORMICK
(DISSENTING OPINION JUDGE CLINTON)

Court of Criminal Appeals - Case Opinion

PDR/Case Number 68,934 Opinion Date: 10/28/87

Style: RICHARDSON, MIGUEL A.

Proc: Event: OPINION ISSD Desc.: Disp: AFFTC

Disposition Without Written Opinion: N

Author Of Majority Opinion: ---

Original: Y
Granting Rehearing: N Denying Rehearing: N Other: N

Concurring:
Dissenting: SNC
Concurring & Dissenting:
Not Participating: BW

Per Curiam: Y Published: Y West Publishing Cite:

======= Is This The Ruling That DECIDED The Case ? Y ==========

Remarks: DISSENTING OPINION JUDGE CLINTON JOINED BY JUDGES TEAGUE & DUNCAN, JUDGE WHITE NOT PARTICIPATING.

Court of Criminal Appeals - Case Opinion

PDR/Case Number 68,934 Opinion Date: 06/12/91

Style: RICHARDSON, MIGUEL A.

Proc: Event: OPINION ISSD Desc.: Disp.: AFFIRM

Disposition Without Written Opinion: N

Author Of Majority Opinion: MJM

Original: Y

Granting Rehearing: N Denying Rehearing: N Other: N

Concurring: FPB
Dissenting: SHC
Concurring & Dissenting:
Not Participating: SW

Per Curiam: N Published: Y West Publishing Cite:

======= Is This The Ruling That DECIDED The Case ? N ==========

Remarks: AFFIRMED ON REMAND FROM USSC-OPINION PRESIDING JUDGE MCCORMICK (CONCURRING OPINION J. BENAVIDES) (DISSENTING OPINION J. CLINTON JOINED BY J. MALONEY) (J. CAMPBELL CONCURS IN THE RESULT) (J. BAIRD DISSENTS) (JUDGE WHITE NOT

(A)

Supreme Court, U.S.
FILED
MAY 11 2001
OFFICE OF THE CLERK

No. 00-1611

In The
Supreme Court of The United States

MIGUEL RICHARDSON,
Petitioner,

v.

GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN CORNYN
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1. Whether a petitioner can complain about a trial court's refusal to submit a supplemental mitigation instruction based on evidence that was not presented in any form at trial, much less evidence that was unknown at the time of trial.

2. Whether a state appellate court's application of harmless error doctrine to a non-constitutional, state law violation relating to the *sua sponte* dismissal of a biased veniremember implicates a constitutionally protected right.

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No. 00-1611

In The
Supreme Court of The United States

MIGUEL RICHARDSON,
Petitioner,

v.

GARY JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Miguel Richardson was properly convicted and sentenced to die for the execution-style murder(s) of John Ebbert (and Howard Powers) during the course of a robbery.[1] The United States Court of Appeals for the Fifth Circuit denied Richardson's application for a certificate of appealability ("COA"). This Court should affirm the judgment of the Fifth Circuit because the state court decision

[1] For clarity, the petitioner will be referred to as "Richardson" and the respondent as "the Director."

that the Fifth Circuit reviewed regarding the claims presented was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying Richardson's COA from the judgment of the district court denying federal habeas relief is attached to the petition. *Richardson v. Johnson*, No. 00-50418, slip op. (5th Cir. Jan. 23, 2001); PA 1:1-12.[2]

JURISDICTION

Richardson seeks to invoke the jurisdiction of the Court to review the circuit court's denial of a COA under the provisions of 28 U.S.C. §1254(1). *See Hohn v. United States*, 118 S. Ct. 1969 (1998).

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[2] "PA" refers to the Appendix filed by Petitioner, by volume and page numbers. "Tr" refers to the documents filed in the underlying cause, or transcript, by page number. "SR" refers to the transcription of the trial proceedings, or statement of facts, preceded by volume number and followed by page number. "SHTr" refers to the transcription of the hearing conducted during state habeas proceedings, or statement of facts, preceded by volume number and followed by page number.

CONSTITUTIONAL PROVISIONS INVOLVED

Richardson bases his claims upon the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF CASE

A. Course of Proceedings and Disposition Below

In May 1981, Richardson was charged by an indictment returned in Bexar County, Texas, with the capital offense of intentional murder of John Ebbert during a robbery. Tr 2. A jury found Richardson guilty of the capital offense on September 16, 1981, rejecting a lesser-offense instruction on murder. Tr 10, 196, 198. A separate punishment hearing ensued, and, on September 18, 1981, the jury answered affirmatively the two special issues submitted pursuant to Article 37.071 of the Texas Code of Criminal Procedure. Tr 10, 223; PA 2:317-18. In accordance with state law, the trial court assessed punishment at death. Tr 10, 199-200.

Appeal was automatic to the Texas Court of Criminal Appeals, which affirmed the conviction and sentence on October 28, 1987. *Richardson v. State*, 744 S.W.2d 65 (Tex. Crim. App. 1987); PA 1:229-88. On July 3, 1989, this Court, however, granted Richardson's petition for writ of certiorari, vacated the judgment, and remanded the action for further consideration. *Richardson v. Texas*, 492 U.S. 914 (1989); PA 1:228. On remand, the Court of Criminal Appeals again affirmed the conviction and sentence. *Richardson v. State*, 886 S.W.2d 769 (Tex. Crim. App. 1991); PA 1:197-226.

Rehearing was denied September 18, 1991. *Id.* On June 28, 1993, this Court again, however, granted Richardson's petition for writ of certiorari, vacated the judgment, and remanded the action for further consideration. *Richardson v. Texas*, 509 U.S. 917 (1993); PA 1:227. On remand, the Court of Criminal Appeals again affirmed the conviction and sentence. *Richardson v. State*, 901 S.W.2d 941 (Tex. Crim. App. 1994): PA 1:189-96. Rehearing was denied by the Court of Criminal Appeals on September 21, 1994, and this Court denied certiorari review on June 26, 1995. *Richardson v. Texas*, 515 U.S. 1162 (1995); PA 1:189.

Richardson filed an application for state writ of habeas corpus with the convicting court in December 1996. After an evidentiary hearing, the trial court entered findings of fact and conclusions of law recommending that habeas relief be denied. PA 2:445-79. The trial court's findings were adopted by the Court of Criminal Appeals on June 10, 1998. PA 1:289-95. Richardson again filed a petition for writ of certiorari, which this Court denied on November 30, 1998. *Richardson v. Texas*, 525 U.S. 1021 (1998).

Richardson proceeded into federal court by filing a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division, on October 8, 1998. PA 1:30. By orders entered on March 28, 2000, the district court denied habeas relief and COA. PA 1:17-186. On April 16, 2000, the district court denied post-judgment relief sought by Richardson and again denied COA. PA 1:13-16. The lower court similarly denied COA on January 23, 2001. PA 1:1-12. Richardson did not move for rehearing. Rather, he filed the instant petition for writ of certiorari on April 20, 2001.

B. Statement of Facts

1. Guilt or Innocence

The Court of Criminal Appeals adequately summarized the facts of Richardson's offense in its original opinion affirming the conviction and sentence on direct appeal:

> [John Ebbert] was a security guard at the Holiday Inn in San Antonio. He and another security guard [Howard Powers] were dispatched early in the morning of March 31, 1979, to investigate a complaint from a guest in room 494 that someone was trying to break into her room. Room 494 was occupied by three women from Mexico City. Shortly after the front desk clerk had sent the two unarmed security guards to investigate the complaint, the guest in room 494 called again and stated she thought she had heard gunshots. Eventually the front desk clerk found the bodies of the two security guards lying in a first floor stairwell. [Powers] had his hands handcuffed behind his back and both had been shot at close range with a .38 caliber Arminius

Titan Tiger pistol. [FN 4]. [Richardson] had acquired a .38 caliber Arminius Titan Tiger pistol several days earlier.

> [FN 4. A firearms and toolmark examiner for the San Antonio Police Department testified that the make of the pistol used in the offense could be and was determined by bullets recovered from the body of the victim].

The evidence also reflected that at the time of the offense [Richardson] and the three young women who were traveling with him occupied the room across the hall from room 494. The three young women, seventeen-year-old Victoria Franklin, sixteen-year-old Rhonda Bearden, and seventeen-year-old Lisa Laursen, were working as prostitutes in the various cities the group visited. All three women testified at the trial. On the evening before the offense, [Richardson] had mentioned that one of the women from Mexico City was wearing what he considered to be expensive jewelry. According to Franklin's testimony, [Richardson] awakened her on the morning of the offense and told her he had disguised himself and, armed with the .38 caliber pistol, had attempted to gain entry to the room occupied by the women from Mexico City. Before gaining entry, he was interrupted by the two security guards. The guards were escorting [Richardson] down the stairs to the

> front desk in order to establish his identity when [Richardson's] weapon, which was in his waistband, fell to the floor. He grabbed the gun, handcuffed one of the guards, took their money, shot and killed both of them, and returned to his room. Upon his request, Franklin went to the scene of the murders and wiped the area with a towel to remove any fingerprints. The victims had not yet been discovered and Franklin saw them lying in the stairwell. She then returned to the room and disposed of the bullets and spent shells by flushing them down the toilet.
>
> [Richardson] and Franklin later told Bearden about the murders. While in Colorado awaiting extradition to Texas, [Richardson] also confessed to Mark Stanley Seiver, another inmate.

PA 1:248-50.

2. Punishment Phase

State's evidence

In 1973, Richardson was convicted of possession of stolen mail. 6 SR 59, 66. The parole officer assigned to Richardson's case testified that he was regularly asked to predict future behavior and that he considered Richardson to be a high risk and dangerous. 6 SR 64-65. Although Richardson was sentenced under the provisions of the Federal Youth Corrections, his parole officer did not recommend him for, and as a consequence he did not receive, a certificate of expungement. 6 SR 67-68.

In January 1979, Mary Wilkinson and several of her friends returned to her home in Oklahoma City after attending an art show and having dinner and were confronted by Richardson and two others who entered beneath the closing garage door. 6 SR 170-72. While the other two perpetrators got the two women out of the back seat and took their coats and jewelry, Richardson asked whose house it was and ordered Wilkinson to disarm the security system. 6 SR 172. According to Wilkinson, Richardson led the group, directing the others and carrying the only gun. At one point, he put the gun to the head of one of her friends and threatened to kill them all if Wilkinson didn't tell the woman who was shouting to shut up. 6 SR 174. Richardson tied-up Wilkinson face down on her bedroom floor while he took the pillow cases off the bed and stole her jewelry and silverware. 6 SR 176. Then he took her to the guest bedroom where her companions were and put her face-down on the bed. Wilkinson could hear the perpetrators going through the closet in that room. Richardson then raped Wilkinson. 6 SR 177.

While Richardson was in the Denver County Jail before being extradited to Texas for the instant offense, he lodged more than twenty complaints about physical ailments, and on each occasion he was transported to Denver County Hospital. 6 SR 35-36. On November 12, 1979, after receiving a treatment slip ordering Richardson's return from the hospital to the county jail, Officer Joe Sanger escorted Richardson from a hospital room to a holding cell at the hospital. After he was in the cell and his leg irons had been removed, Richardson grabbed Sanger's gun. A life or death struggle ensued where the officer's finger wedged behind the trigger was the only thing that prevented Richardson from

pulling the trigger of the gun he pointed at Sanger. Richardson told Sanger, "You may as well give up because I have the hammer back and I have control." 6 SR 37-39. During the struggle, he also threatened, "I'll kill any white mother fucker, especially any cop that gets in my way." 6 SR 43. After Richardson was subdued, Sanger was hospitalized for a torn rotator cuff of the right shoulder. 6 SR 40.

On April, 20, 1980, Richardson attacked the shift commander at the Denver County Jail where he was being held pending his extradition to Texas. Richardson became violent and agitated in the shift commander's office after being informed that he would be placed in isolation, and he attempted to strike the officer with a fire extinguisher. 6 SR 17, 31. He threatened that if he were not allowed to go to the gym or given some type of recreation that he would hurt someone when he first got the opportunity and that "if he saw daylight he would hurt someone to get out." 6 SR 18. Following the attack, Richardson was maced and carried to isolation. Once in isolation, he stated that he would no longer struggle, but as the escorting officers left his cell, Richardson hit one of them on the left side of his jaw. 6 SR 31. After Richardson was again brought under control and the officers left his cell, he threatened them, "If I ever get on the street, I'll kill every one of you." 6 SR 32.

On June 19, 1980, Richardson again attempted to escape from Denver authorities after being taken to the hospital. This time, after his handcuffs were removed, Richardson stabbed Deputy Sheriff Kenneth Hall in the neck with a long instrument that had been concealed in his pants. 6 SR 77. The instrument penetrated the right side of Hall's neck to his spine. 6 SR 75.

Robert Rast, a clinical psychologist, testified that many of the acts set forth in the State's hypothetical delineating the sequence of events established by the guilt-innocence and punishment phase evidence were sociopathic and that the person described in the hypothetical would continue to be a danger to others both outside and in prison. 6 SR 207-09. Rast described a sociopathic or psychopathic person as exhibiting a personality disorder rather than suffering from mental illness. The sociopathic personality was described as lacking a conscience, manipulative, self-centered, not learning from previous experience, and lacking emotional depth. 6 SR 203-04.

Robert Jones, an Oklahoma City Police Department detective, testified that Richardson's reputation for being a peaceful, law-abiding citizen was terrible. 6 SR 53.

Defense evidence

Norm Kabelitz, pastor of the Redeemer Lutheran Church, had known Richardson since he was eleven years old. 6 SR 244-45. Richardson had served as an acolyte in Kabelitz's church. Reverend Kabelitz described Richardson's family as a "well put together family [with] a very strong father image." Richardson's father was a strict disciplinarian and his mother a national leader in the Lutheran Church. 6 SR 250. The reverend identified desegregation as one of the major issues confronting Oklahoma City at the time, and, although he described Richardson as closed and uncommunicative of his feelings, stated that he knew that the integration of schools must have caused Richardson to question authority figures who engaged

in violence and lawlessness directed against integration.[3] 6 SR 248-52. Kabelitz also observed that Richardson's inability to read well affected his self image and peer relationships. 6 SR 245.

According to Reverend Kabelitz, Richardson had an open and attractive personality. On one occasion he acted as emcee for a fund raising fashion show held at the church. Young girls from the community, but not known to Kabelitz, "obviously" attended the show because they were fascinated by and attracted to Richardson. 6 SR 256-57. Richardson also contributed religious drawings to the parish's annual art festival. Kabelitz viewed Richardson's handling of crucifix themes, suffering, and pain as revealing that he was learning to deal with the world. 6 SR 259. His poetry, according to Kabelitz, revealed an ability or willingness to help others. On cross-examination, Kabelitz credited Richardson with "gift insight" resulting from his own suffering and stated that he first saw signs of this gift in 1978. 6 SR 268.

Lee Griswold, an optometrist and lay minister in the Catholic Church, began visiting Richardson at the Denver County Jail at the request of Richardson's mother. By the time of trial, Griswold had known Richardson for about a year and a half. 6 SR 84-86. During their weekly visits, Richardson and Griswold discussed religion, and Richardson told Griswold that he wanted to be saved. Richardson also "passed on" what he learned about religion to other inmates.

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[3] Richardson's Sunday school teacher testified that Oklahoma City had problems integrating schools and that people at the church counseled Richardson and others about integration. 6 SR 241-42.

6 SR 88-90. Cross-examination revealed that Richardson's attack on Deputy Hall occurred after he professed religious conversion. 6 SR 94.

Wayne Bernard, minister at the Randolph Church of Christ in Universal City and volunteer chaplain at the San Antonio Jail, had known Richardson six months. During that time Richardson attended Bible study group and, after his baptism at the jail, Bernard observed "real conversion within Miguel" and no acts of violence. Bernard identified three religious pictures as Richardson's, and they were entered into evidence. 6 SR 272-77.

Herbert Holston, minister at the Mount Zion First Baptist Church, visited Richardson four or five times at the jail in San Antonio. According to Holston, Richardson had a good grasp of major biblical concepts. 6 SR 119-21.

Linda Cowart, a friend who had known Richardson for three or four years, described Richardson as a happy go lucky person whom she had never known to be violent. When asked whether Richardson had any special talents, Cowart stated that she had seen drawings that he had done on the outside of envelopes and had read some of his poetry, and "[i]n visits he can come off with things just right off the top of his head that are kind of–oh, little funny type things." Cowart was going blind from diabetes, and every time she got a letter from Richardson or talked to him, he asked about her eyesight. 6 SR 99-102.

Another friend, Cynthia Parks Lee, met Richardson at a lounge in Denver and, by the time of trial, had known him for four or five years. 6 SR 105. Lee described Richardson

as "very pleasant and just real jolly"; she had never known him to be violent, mean, or vicious. 6 SR 107. As an example of the "warmth and feeling" exhibited by Richardson toward others, Lee described his friendship with Karen Cracken, a fourteen-year-old adopted child of an alcoholic mother. According to Lee, Cracken suffered from rheumatic fever and a disease that distorted the growth of her bone, and Richardson's letters and calls from jail changed Cracken's life and allowed her to withstand the teasing of schoolmates. Lee described that Richardson was a gifted artist and poet. 6 SR 110.

Richardson's sister, Paquita, described her family as a typical middle class family and their childhood as close and normal. 6 SR 130, 137. Richardson's father was a civil servant at Tinker Air Force Base; his mother was a homemaker until she went to work as a customer relations person at Hertz when Richardson was in high school. 6 SR 126. Paquita described her father as strict but understanding and agreed with the prosecutor's description of her parents as good and decent people. 6 SR 132, 137. They grew up on a "sort of farm" on which there were two ponds and two tree houses, and each of the nine children had his or her own pet. Richardson had a horse. 6 SR 129. Their land was nearly self-supporting and they "ate well." 6 SR 130.

Richardson and his sister started school in an all black school, but when their mother discovered that they lived in the district of an all white school, Pleasant Hill, she enrolled her children there. After finishing the eighth grade at Pleasant Hill, Richardson attended Dale City High School, where fewer than twelve blacks were enrolled. According to Paquita, there was no racial conflict at Dale City High School

when she and her brother went there. Richardson got along well with the other students, had lots of friends, was an average student, and played football. 6 SR 130-32.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THE COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. As an initial matter, Richardson filed his initial federal habeas petition in October 1998, well after enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Accordingly, the AEDPA standard of review guides this Court's review of the questions presented. *See (Michael) Williams v. Taylor*, 529 U.S. 420, 429 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case."). Under the amended provisions of Section 2254(d), a state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). Section 2254(d)(1) provides the standard of review for questions of law and mixed questions of law and fact. *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The Court's decision in *(Terry) Williams* makes clear that a federal court's discretion to grant a writ of habeas corpus is limited and the court may only issue a writ if the state court's decision was "contrary to" or "involved an unreasonable application of" established federal law. 529 U.S. at 412-13.

Under the "unreasonable application" clause, the Court may grant the writ if the state court identifies the correct governing legal principle but applies it incorrectly, or extends or refuses to extend a legal principle to an area outside the scope intended by this Court. *Id.* at 408, 413. Furthermore, the state court's application of the law must be "unreasonable" in addition to being merely "incorrect." *Id.* at 411. The Court explained, "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

Under the "contrary to" clause of section 2254(d)(1), a federal court may grant the writ if the state court has arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of

materially indistinguishable facts. *Id.* at 412-13.

For the reasons discussed below, and in light of the AEDPA standard of review, Richardson fails to advance a compelling reason for this Court to review his case, and none exists. Accordingly, this Court should decline to exercise its certiorari jurisdiction to review Richardson's claims.

II.

THE REFUSAL OF THE TRIAL COURT TO SUBMIT REQUESTED SUPPLEMENTAL JURY INSTRUCTIONS AT THE PUNISHMENT PHASE OF TRIAL DID NOT PRECLUDE RICHARDSON FROM OFFERING ADDITIONAL EVIDENCE AT TRIAL.

A. Richardson cannot base a complaint regarding a refusal to submit requested jury instructions on evidence that was not presented at trial, much less evidence that was unknown by trial counsel.

After the parties had rested and closed their cases on punishment, Richardson submitted five proposed jury instructions regarding mitigating evidence. 6 SR 280-81. PA 2:301-10. Each of these five proposed mitigation instructions essentially told the jurors that they could change a "yes" answer on a special issue to a "no" answer if the jurors determined that evidence of Richardson's character and/or the circumstances of the offense mitigated against imposition of the death penalty. PA 2:301-10. Richardson asserts that these proposed instructions would have satisfied the defect

found in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*),[4] and that the refusal of the trial court to submit one of his proposed mitigation instructions prevented his counsel from developing and presenting evidence that Richardson had endured childhood physical and sexual abuse.

Initially, as a factual matter, it is an absurd proposition that the trial court's actions precluded Richardson from developing or presenting evidence of purported childhood physical and sexual abuse at his trial. Richardson had already rested and closed his case before the trial court ruled on the requested mitigation instruction. Moreover, during state habeas proceedings, trial counsel testified that his interviews with Richardson and Richardson's family members failed to reveal a history of possible physical or sexual abuse. PA 2:378-79, 390; 5 SHTr 577, 601; *see* 5 SHTr 605, 609 ("Well, I really didn't make that choice [between presenting a theory regarding child abuse rather than a theory regarding a positive upbringing by a "normal loving family"] because, number one, I didn't know about the child abuse evidence."). Trial counsel also testified that: he did not recall having discussed the proposed mitigation instructions with the trial court judge prior to the charge conference; he was aware that at least one district judge in

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[4] Specifically, Richardson states that this type of mitigation instruction is "of the type later endorsed in *Penry I*." Petition at 10. Ironically, the firm representing Richardson is representing Johnny Paul Penry in a separate matter before this Court claiming that such an instruction fails to satisfy *Penry I* and is an "unconstitutional nullification instruction." *See Penry v. Johnson*, No. 00-6677.

the county had previously granted such an instruction; and he did not know whether such an instruction had been presented (in prior cases) to the judge presiding at Richardson's trial. 5 SHTr 563, 565. For these reasons, it is utterly disingenuous for Richardson to claim that the trial court's refusal to submit one of Richardson's proposed mitigation instructions interfered with strategic decisions at trial. PA 1:15; *see also Engle v. Isaac*, 456 U.S. 107 (1982) (perceived futility of raising an objection or legal argument will not excuse a procedural default even if reasonable counsel would have chosen to forego the objection or argument).

Further, a defendant cannot base a complaint regarding a trial court's denial of requested mitigation instructions on evidence he failed to present at trial in support of the instruction in the first instance. This Court has consistently held that "the sentencer must be allowed to consider in mitigation 'any aspect of a defendant's character or record and any of the circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death.'" *Delo v. Lashley*, 507 U.S. 272, 275 (1993) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)) (emphasis in *Delo*). Even in *Penry I*, this Court found that "there is no constitutional infirmity in a [sentencing] procedure that allows a jury to recommend mercy based on the mitigating evidence *introduced by a defendant*." *Id.* (quoting *Penry I, supra*, 492 U.S. at 327) (emphasis in *Delo*). This Court further explained, "[W]e never have suggested that the Constitution requires a state trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence." *Id.* Accordingly, as the lower court has repeatedly found, it follows that a criminal defendant is not entitled to habeas relief on the basis of mitigating

evidence that was never presented at trial. *See* PA 1:87 n.144 (citing nine published Fifth Circuit decisions rejecting the claim).[5]

For these reasons, the lower federal courts were correct in finding that the AEDPA forecloses relief. PA 1:9,

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[5] Additional published decisions of the Fifth Circuit have rejected this claim. *Allridge v. Scott*, 41 F.3d 213, 223 (5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995); *Marquez v. Collins*, 11 F.3d 1241, 1248 (5th Cir.), *cert. denied*, 513 U.S. 881 (1994); *Demouchette v. Collins*, 972 F.2d 651, 652-53 (5th Cir.), *cert. denied*, 505 U.S 1246 (1992). Richardson claims that his case is distinguishable from the prior Fifth Circuit decisions rejecting this claim because he actually developed a record of the evidence that had not been presented to the jury. Although some of the published decisions may not clearly state what formed the evidentiary basis for the unproffered evidence, some of the published decisions mention the form of evidence. For example, in *Lackey v. Scott*, the petitioner's additional mitigating evidence was presented during a federal evidentiary hearing. 28 F.3d 486, 489 n.3 & 490 (5th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995). The same appears to be the case in *Demouchette*, *supra*. Similarly, in *Andrews v. Collins*, the petitioner's additional mitigating evidence was presented during a state habeas hearing. 21 F.3d 612, 617 n.6, 619 n.10, 623 n.20, 624, 630 (5th Cir. 1994), *cert. denied*, 513 U.S. 1114 (1995). Finally, in *May v. Collins*, the petitioner presented affidavit testimony from a psychiatrist regarding childhood abuse and brain damage. 948 F.2d 162, 164-65 (5th Cir. 1991); *see also May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990).

15, 87-92; PA 2:448.[6] Relief is also foreclosed by *Teague v. Lane*, 489 U.S. 288 (1989).

B. The evidence unknown by trial counsel was not constitutionally relevant mitigating evidence.

Additionally, apart from the fact that evidence of purported childhood physical and sexual abuse was not presented at trial, much less even known by trial counsel, the additional evidence at issue was not constitutionally relevant mitigating evidence. The Court recognized in *Skipper v. South Carolina* that not everything a defendant introduces in mitigation of punishment is "relevant mitigating evidence." *Skipper*, 476 U.S. 1, 7 n.2 (1986). Evidence of a defendant's character or background attains constitutionally mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character or background proffered in mitigation of punishment:

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[6] Richardson asserts that he is entitled to relief on this claim because "the decisions of the Fifth Circuit, the District Court, and the state habeas courts, are in conflict with *Hall* and *Evans*." Petition at 17 (citing *Hall v. State*, 541 So.2d 1125 (Fla. 1989) and *State v. Evans*, 584 P.2d 1149 (Ariz. 1978)). Even if this were true, which it is not, this case is before the Court under the AEDPA standard of review which requires a conflict with "clearly established" federal law as determined by *this* Court. Regardless, both *Hall* and *Evans* concerned situations where consideration of mitigation evidence was limited to statutorily enumerated mitigating circumstances. *Hall*, 541 So.2d at 1126; *Evans*, 584 P.2d at 1153.

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse . . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (emphasis in original)); *see also Penry I*, 492 U.S. at 319. Thus, unless the defendant can demonstrate some connection between his crime and his proffered evidence, he does not show that his culpability is reduced. *See Madden v. Collins*, 18 F.3d 304, 307 (5th Cir. 1994) (finding that in contrast to Madden's evidence of a personality disorder, a learning disability, and a troubled childhood, in Penry "there was a clear nexus between Penry's handicap and his criminal act"), *cert. denied*, 513 U.S. 1156 (1995). Without a nexus between the crime and the defendant's proffered mitigation evidence, such evidence can only provide a basis for the jury to exercise sympathy for the defendant, and a decision based only on sympathy cannot be a reasoned moral response to the defendant's culpability. *See Saffle v. Parks*, 494 U.S. 484, 492-93 (1990).[7] Accordingly, even had Richardson's counsel

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[7] During the state habeas hearing, Dr. Joseph Eubanks, a neuropsychologist called as a witness by Richardson, was asked, "Are you here today, Dr. Eubanks, to testify that there

discovered and presented evidence of childhood abuse, that evidence, without more, is not relevant to his culpability for his crime and could have only provided a basis for the jury to exercise sympathy or mercy, to which Richardson is not constitutionally entitled. *Id.* at 492-93.[8]

C. Richardson's claim regarding an entitlement to a mitigation instruction based on the evidence actually presented at trial is not properly before the Court.

Richardson also asserts that evidence he presented at trial of "a troubled childhood, racial violence in school, religious devotion and kindness to others" was beyond the scope of the special issues and therefore he was entitled to a mitigation instruction. In the lower court, Richardson's sole mention of the evidence in the record in relation to a *Penry I* claim was in a footnote. In that footnote, Richardson stated

> . . . [that in] considering whether the evidence adduced at the state habeas hearing would have

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is such a nexus between the history of child abuse, if it occurred, and the crime?" Dr. Eubanks replied, "No, I can't be." 5 SHTr 463.

[8] Additionally, because behavioral problems which can stem from a history of childhood physical and sexual abuse have the possibility of being successfully treated, such evidence is not beyond the scope of the Texas special issues. *Clark v. Collins*, 19 F.3d 959, 962-63 (5th Cir.), *cert. denied*, 513 U.S. 966 (1994); *Motley v. Collins*, 18 F.3d 1223, 1234-35 (5th Cir.), *cert. denied*, 513 U.S. 960 (1994).

> required a *Penry* instruction, the Court should also recall that the judges who have previously reviewed this case were not unanimous in their determination that the evidence *already in the trial record* did not require a *Penry* instruction.

See Memorandum of Law in Support of Petitioner's Motion for COA at 57-58 n.10 (emphasis in original). Richardson then briefly summarized the procedural history of his case on direct appeal following the two remands from this Court. *Id.* Richardson did not inform the lower court what evidence "already in the trial record" he was referring to nor did he cite any legal authorities to support an entitlement to a mitigation instruction based on this undefined trial record evidence. *Id.*

Further, in his "Issues Presented For Review" section, Richardson stated that his mitigation instruction claim was:

> Whether the trial court's instructions to the jury prevented Petitioner-Appellant's trial counsel from introducing potentially mitigating evidence for fear that the instructions circumscribed the jury's ability to consider it as such.

Id. at 1. The lower court made no mention of Richardson's passing reference to any type of claim based on the evidence "already in the trial record," PA 1:9, and Richardson did not seek rehearing on any issue. For all these reasons, Richardson's claim is not properly before the Court. *See Rogers v. Lodge*, 458 U.S. 613, 628 n. 10 (1982) (holding that an issue which was "not properly raised in the Court of

Appeals and was not addressed by that court" will not be considered by United States Supreme Court); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) (same).[9]

III.

THE APPLICATION OF HARMLESS ERROR DOCTRINE TO A STATE LAW VIOLATION RELATING TO THE EXCLUSION OF A POTENTIAL JUROR ON NON-CONSTITUTIONAL GROUNDS DOES NOT RAISE A FEDERAL CONSTITUTIONAL QUESTION.

Richardson's second, and final, question for review concerns the exclusion of potential juror William Noble. Noble was excused *sua sponte* by the trial court after he *invited* the prosecutor to explore the issue of bias then stated that he was a journalist by profession, took all the newspapers, and had already formed an opinion as to Richardson's guilt or innocence:

> [Prosecutor]: I'm not asking you to not contradict yourself or to contradict yourself, I'm asking you just to tell me just as honestly as you can so that I know whether or not you can sit here as a fair and unbiased juror and do the job that the jurors must do?

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[9] Even were the claim properly before the Court, the lower district court's opinion aptly demonstrates that relief is foreclosed under the AEDPA and *Teague v. Lane*, *supra*. PA 1:56-87, 90.

[Noble]: If I were a juror I would try to serve to the best of my ability. That's what I can say.

[Prosecutor]: All right.

[Noble]: You used a couple of words there, bias and impartial that I think you might want to pursue.

[Prosecutor]: Well, are you biased in some manner about this case?

[Noble]: Well, I have read quite a bit about it. And I feel that I have already prejudged the case. I mean I take all the newspapers. I'm a journalist by profession and I know – I don't disregard what I see in the paper.

[Court]: Have you already formed an opinion as to the guilt or innocence?

[Noble]: Yes, Your Honor. I think it's only fair that I say that I have formed an opinion.

[Court]: You will be excused Mr. Noble. You can return to the Central Jury Room. They will discharge you from there.

PA 2:326-27. On direct appeal, the Court of Criminal Appeals found the trial court's exclusion of Noble was error under state procedural law, TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(10), because the trial court failed to inquire whether

Noble's pre-formed opinion regarding Richardson's guilt would influence his verdict. PA 1:240-41. Nevertheless, the Court of Criminal Appeals held the error was harmless. PA 1:246-27. Richardson asked both the lower federal courts to elevate the state law error of the trial court as found by the Court of Criminal Appeals to a federal constitutional violation. The lower federal courts' rejection of that request was entirely correct.

First, it is readily apparent that the trial court believed Noble's explicit statements that he had prejudged the issue of guilt or innocence, that he had read about the case in the newspaper, and that he does not disregard what he reads in the newspapers. Thus, as the district court noted, the trial court made a finding of juror bias, which is entitled to a presumption of correctness. PA 1:97, 99-100. The only error committed by the trial judge in ultimately excluding this biased juror was failing to make an additional inquiry required by *state* law. However, it is settled that violations of state procedural rules simply do not state a claim for federal habeas corpus relief. *See Cook v. Morrill*, 783 F.2d 593, 596 (5th Cir. 1986) (federal habeas courts "do not sit as a 'super' state supreme court in a habeas corpus proceeding to review errors under state law") (citations omitted); PA 1:97. Accordingly, for this reason alone, the state courts' application of a harmless error analysis to this state law violation is simply immune from federal habeas corpus attack. *Cf. Nichols v. Scott*, 69 F.3d 1255, 1288 (5th Cir. 1995) (finding no prejudice from counsel's failure to object to alleged improper jury shuffle; claim that alternate juror, "who would have been reluctant to impose capital punishment," would have been the twelfth juror was "purely speculative and is insufficient to establish prejudice"), *cert.*

denied, 518 U.S. 1022 (1996).[10]

Further, Richardson's attempt to elevate this state law violation to a federal constitutional violation is entirely unavailing. Relying on this Court's opinion in *Gray v. Mississippi*, 481 U.S. 648 (1987), Richardson asserts that, because Noble was a *Witherspoon*-qualified[11] juror, the Court of Criminal Appeals erred in concluding that his improper exclusion for cause on non-*Witherspoon* grounds can be harmless. However, as the district court ably noted, it is beyond cavil that Noble's exclusion had nothing whatsoever to do with his views of capital punishment[12] and thus does

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[10] Richardson conceded to the lower court that the trial court's error of state law did not violate any federal constitutional right he possesses. *See* Memorandum of Law in Support of Petitioner's Motion for COA at 26 ("It is the CCA's holding of harmless error, and *not* the trial court's initial error, that violated Mr. Richardson's federal constitutional rights . . . ."). It defies logic, therefore, that a state appellate court's application of harmless error doctrine to non-constitutional error implicates a protected federal constitutional right.

[11] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[12] Richardson concedes that Noble's exclusion had nothing whatsoever to do with his views on capital punishment. *See* Petition at 23 ("Petitioner has never asserted that Mr. Noble was excused based on his views about the death penalty."). Thus, his concerns regarding a case of pretextual exclusion of *Witherspoon*-qualified jurors are entirely irrelevant. Further, and regardless, the trial

not come within the scope of this Court's concerns in either *Witherspoon* or *Gray*. That is, contrary to Richardson's assertions, *Witherspoon* and its progeny, including *Gray*, do not stand for the proposition that a defendant in a capital case has an affirmative constitutional right to retain *Witherspoon*-qualified jurors, much less an affirmative constitutional right to retain a juror who has prejudged the issue of guilt or innocence. Indeed, the scope of the decision in *Gray* was expressly limited to wrongful *Witherspoon* exclusion. *See also Ross v. Oklahoma*, 487 U.S. 81, 87 (1988) ("We decline to extend the rule of *Gray* beyond its context: the erroneous '*Witherspoon* exclusion' of a qualified juror in a capital case"). For all these reasons, the lower court correctly found this claim not worthy of COA because the district court's rejection of this claim under the AEDPA and *Teague v. Lane*, *supra*, was entirely correct. PA 1:5-6, 94-98, 100-01.

Finally, the sole federal constitutional issue arguably implicated in this case is whether Richardson's right to an impartial jury was violated. To that end, Richardson has never alleged, much less established, that any of the jurors who actually decided his fate were not impartial. *See also* PA 1:98-100.

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court's presumptively-correct finding of juror bias due to a preformed opinion regarding guilt or innocence obliterates any question of pretext.

CONCLUSION

For the foregoing reasons, the Director respectfully requests this Court to deny Richardson's petition for writ of certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

MIGUEL RICHARDSON,
Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

IMMINENT EXECUTION SCHEDULED
FOR 6:00 P.M. JUNE 26, 2001

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40 pp

Dr. Eubanks on the way. Unfortunately I neglected to bring it in my briefcase, but it should be here shortly. And, Your Honor, I'll have to ask your indulgence. For those who don't have experience in the domestic violence unit, I've got to ask a few questions that you are going to be very familiar with the answer.

THE COURT: Yes.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Dr. Eubanks, what does the term child abuse mean when it's used by a mental health professional?

A. It means subjecting a child to physical or emotional stressors that are beyond those accepted by society in general as disciplinary tools. There is no complete, I mean, you know, demarcating line saying this is not abuse and this is. It's an area of watershed between strict discipline and abuse, but it's, clinical judgment would say that this is abuse versus this is disciplinary, normal disciplinary tools.

Q. Are you called upon to exercise that professional judgment in the course of your work as a neuropsychologist?

A. Most of the time it has already been determined that that abuse had taken place. I'm sort of the end of the analysis, not at the beginning of the analysis. I confirm it, but not necessarily. I'm not usually the first person to identify that that is the problem.

MR. LANE: Your Honor, may I approach the witness?

THE COURT: You may.

(WHEREUPON, at this time,
(Petitioner's Exhibit No. 26 was
(marked for identification.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Dr. Eubanks, I'm going to hand you what has been marked Petitioner's Exhibit 26 for purposes of identification and ask you to identify that document.

A. It's my Curriculum Vitae. It talks about education, experience, publications, presentations, et cetera.

MR. LANE: Your Honor, Petitioner offers Exhibit 26 into evidence.

MR. SHAUGHNESSY: No objection.

THE COURT: It's admitted.

(WHEREUPON, at this time,
(Petitioner's Exhibit 26 was
(admitted into evidence.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Now, you testified just before I put in your Curriculum Vitae about the definition of child abuse and what is regarded as child abuse, and I want to return to that subject for a moment.

A. Okay.

Q. Does child abuse include both physical abuse and psychological abuse?

A. It does.

Q. I'm going to ask you a number of hypothetical questions and ask you whether these hypothetical situations would constitute child abuse in your opinion.

Suppose a child is beaten with a garden hose or a razor strap for purposes of discipline; would that be regarded as child abuse?

A. I would consider that abuse. Yes.

Q. What about the use of a two-by-four, a two-by-four board or piece of lumber?

A. I would consider that abusive.

Q. What if a child were beaten with a sawed-off broom handle during the course of a school lesson?

A. I would consider that abusive.

Q. Suppose a child was beaten into unconsciousness while tied to a pole?

A. I would consider that abusive.

Q. What if a child was threatened with a knife held to his neck by one of his parents?

A. I would consider that abusive.

Q. And I'm presuming, and I assume you are presuming that in all these circumstances this is a parent who is administering this beating. Is that your assumption?

A. I would consider it abusive if anybody did that to a child.

Q. Would it have a different effect if it's, in fact, the parent who is administering this type of physical abuse?

A. Most likely.

Q. What about stabbing with a knife in the buttocks by a parent?

A. I would consider that abusive.

Q. Would a person, Dr. Eubanks, in your opinion, who suffered all of these things that I've described over a period of years through the age of 16 be considered to have a history of child abuse?

A. I would consider the history, yes.

Q. What is the likely effect, in your professional judgment, of a history of child abuse on a person later in life, say in his mid-twenties?

A. The effects are very widespread, going anywhere from withdrawal and depression, social isolation, to very violent acting out behavior.

Q. Is a victim of child abuse likely to be less capable of functioning socially?

A. Research evidence indicates that to be true.

Q. What sort of observable behavior might result from a history of child abuse?

A. Perpetuation of abuse on the next generation or other people could be one of the indicators.

Q. Okay.

A. A whole range of antisocial behaviors.

Q. Might criminal acts be an observable behavior that might result from a history of child abuse?

A. In as much as antisocial behaviors are often criminal acts, certainly.

Q. What about violent acts towards others?

A. Certainly acting out can be, physical acting out can be a result of child abuse.

Q. Is it possible for a person who has a history of child abuse, or physical abuse as a child, to still regard his childhood as perfectly normal?

A. If the child knows no better and has no reference, and also there can be mechanisms that the child has developed to be able to accept and say this is my life. They certainly could overtly say that this is just the way life is, and not see it as outside of the norm of normal child rearing.

Q. Let me get more specific with you, Doctor. Is it possible for a child that had been beaten and to have seen a sibling beaten before him and still think, still believe that his family and his childhood was normal?

A. I think they certainly could say that and have a superficial conscious belief. I'm sure that there is a lot of unconscious emotional turmoil associated with it under the surface.

Q. What does the term cognitive dismiss mean?

A. Well, it's a psychological concept where something that's just intolerable to you and you are subjected to that untolerableness and you can't escape from it. You accept it.

Q. How would cognitive dismiss manifest itself in a victim of child abuse?

A. That this is normal.

Q. When would such a person actually realize that he had suffered an abusive childhood?

A. If they are able to discover that the type of childhood that he or she had was outside of the norm.

Q. Typically, how does that occur, Doctor?

A. Exposure, being talked about in therapy.

Q. Does the victim of child abuse still love his parents?

A. They can very much love their parents.

Q. May a victim of child abuse still want to believe that his parents were good and decent people?

A. Yes.

Q. If a family lived apart from other families, as in the country, would that make it less likely that the victim of child abuse would recognize his upbringing as having been abusive?

A. They wouldn't have as much reference to other families.

Q. I want to turn to another subject at this time, Dr. Eubanks. What is antisocial personality disorder?

A. It's a subtle behavior seen in individuals that have been characterized by psychiatrists, psychologists, and other mental health professionals to describe an individual's behavior in his or her world that is decidedly against the norm of society and typically causes of these behaviors can cause harm and discomfort to other people.

There is a list of diagnostic categories. The ones that are currently in use come from the Diagnostic and Statistical Manual IV that has been published by the American Psychiatric Association.

Q. Could you tell us what that is? Is that known as DSM-IV?

A. Right.

Q. Could you tell the Court what exactly the DSM-IV, that big thick book you have there in your hand is?

A. In behavioral disorders, we don't have any good analytical test tube type of analyses to be able to say that this is something. You take a serum level and look at cholesterol, we can measure your cholesterol and say that you have 270 milligrams per milliliter and you better go on anti-cholesterol medication. We don't have anything like that in psychology and psychiatry. So symptoms, behaviors, overt kinds of acts need to be analyzed, put into categories, and a consensus developed so that people have an idea about what they are talking about. And over the course of years, the Diagnostic and Statistical Manual has been developed and refined. And right now the fifth version is being worked on.

Q. Well, there was a prior version called DSM-III; is that right?

A. Right. And the revision of that as well.

Q. Let me ask you, when they changed DSM-III to DSM-IV, to the extent that they changed certain tests, certain things that you as psychologists look for, did that mean that what the person was suffering from changed or that the understanding of what the person was suffering changed?

A. Probably - this is not a theoretical book. This is a description of behaviors. It's been carefully made to be atheoretical so that people with different theoretical orientations could still use the same diagnostic criteria. So, these are based upon observable behaviors that most people could agree on. Not necessarily the underlying reasons that those behaviors have emerged.

Q. I want to turn back to antisocial personality disorder, which you testified to a little earlier. Is that disorder caused by anything?

A. Well, as scientific rationalists, everything is caused by something. As far as we know, if there is a combination of variables that are both genetic and environmental that can be looked at, individuals with a diagnosis of a particular disorder, including antisocial disorder, and see that these things have a certain robustness. In other words, there's not necessarily all elements are necessary, but when you see a certain degree of elements in a person who has met the diagnostic criteria in the particular hypothetical case of antisocial personality disorder.

Q. Is a professional psychological establishment recognized that there are a number of factors which may be contributing factors in causing antisocial personality disorder?

A. Yes. As a matter of fact, in a very recent paper published in the American Psychologist, April of 1997, a behavioral geneticist from London by the name of Michael L. Rutter, R-U-T-T-E-R, just published an article called "Nature-Nurture Integration, an example of antisocial behavior, and argues that there are both genetic and environmental factors that contribute to the development of this personality disorder. He also argues that we don't know enough about it to be able to be definitive in what causes the disorder.

Q. Have psychologists in the field recognized that a history of child abuse might be or is a potential contributing factor to antisocial personality disorder?

A. It can be a contributing factor.

Q. Now, I'm going to hand you what has been marked as Exhibit --

MR. LANE: Excuse me. May I approach the witness?

THE COURT: You may.

(WHEREUPON, at this time,
(Petitioner's Exhibit No. 27 was
(marked for identification.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. -- Petitioner's Exhibit 27 for purposes of identification. I'm going to hand you what's been marked as Petitioner's Exhibit 27 and ask you if you have reviewed that document.

A. I have read this document.

Q. Is what I just handed you a report by Betty Lou Schroeder that was prepared after Miguel Richardson was arrested?

A. I assume so. It's marked '81. I think - I don't know when he was arrested, but it was when he was in jail.

Q. Okay. Have you reviewed that report?

A. Yes, I have.

Q. Do you recall what Dr. Schroeder concluded in that report?

A. Her diagnostic impressions were antisocial personality disorder, provisional psycho-sexual disorder, orthopedic problems, headaches, and psychological stressors were legal offenses, health problems and bi-sexuality.

Q. Do you agree with the conclusions she reached in that report?

A. I don't have enough data to agree with her conclusions or disagree with them. She was not allowed to give any psychological diagnostic procedures. Just based apparently on a clinical interview.

Q. Have you also reviewed the affidavit of Julio Richardson that was submitted with the application for habeas relief in this case?

A. Yes, I have.

Q. Let me ask you, if you were to examine Miguel Richardson today and perform the whole range of

psychological tests that you considered appropriate and that were available, would you be able to determine today whether he suffered from antisocial personality disorder as of the time of the crime which was committed?

A. That was an awful long time ago. I don't think our state of the art would allow us to have a high degree of certainty of what somebody was doing or thinking fifteen or so years ago.

Q. What are the indicators of an antisocial personality disorder?

A. Antisocial behavior. I mean, sorry to sound glib, but that's basically what the indicators are. According to the DSM-IV, which is the document that is used to diagnose the disorder now, there has to be a pervasive pattern of disregard for and violation of the rights of others occurring since the age of 15, as indicated by three or more of the following:

Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.

Deceitfulness as indicated by repeated lying, use of aliases or conning others for personal profit or pleasure.

Impulsivity or failure to plan ahead.

Irritability and aggressiveness as indicated by repeated physical fights or assaults.

Reckless disregard for safety of self or others.

Consistent irresponsibility as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.

Lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

Another criteria is that the individuals is at least 18 years old.

The third criteria is that there is evidence of a conduct disorder with onset before the age of 15, and that the occurrence of antisocial behavior is not exclusively seen during the course of schizophrenia or manic disorder.

Q. Doctor Eubanks, could the commission of a violent crime be an indicator of an antisocial personality disorder?

A. I'm sorry. Could you repeat the question?

Q. Could the commission of a crime be an indicator of an antisocial personality disorder?

A. By definition, yes.

Q. If you encountered a situation where a person was accused of a crime, would you want to, as a psychologist, develop and investigate whether, in fact, there was a connection between the disorder and the crime?

A. As a psychologist, I would want to look at the development of background versus behavior, not crime, because it's not a legal analysis, it's a behavioral analysis.

Q. Dr. Eubanks, in your professional opinion, can a history of child abuse lead a person to do something in later

years that that person would not otherwise have done absence such abuse?

A. I don't think that you can say yes to that answer or no to that answer. It will depend. There is no direct "no, yes," if this happened as a child, these things will happen as an adult.

Q. Based on your - if you were to investigate the individual and examine the individual, would you be able to determine whether a strong correlation existed?

A. I think a case could be built for that, but again, it would have to depend upon what the data said, not what a preconceived idea would be.

Q. Faced with the evidence of the child abuse and the evidence of the behavior, the antisocial behavior later on, could you investigate the existence of a nexus between those two phenomena?

A. It could be investigated, yes.

Q. Could you actually develop evidence as a psychologist of a nexus there?

A. Within the restraints of psychological measuring and conceptualization, I think one could be developed if the data supported it.

Q. Is a person with a history of child abuse, Dr. Eubanks, likely to respond differently to a stressful situation than a person who has suffered no such abuse?

A. Yes, they are.

Q. May a person with a history of child abuse respond by lashing out?

A. That could be one of the ways that they could respond.

Q. By acting impulsively?

A. That could be one of the ways they would act out.

Q. By reacting violently?

A. Certainly.

Q. By using a weapon if the person had a weapon?

A. Certainly.

Q. Would an examination of Miguel Richardson today allow you to develop evidence to determine whether a history of child abuse the man suffered as a child contributed to the commission of the crime which he was accused later in life?

A. I would have to - it would depend upon what the data said, you know. I think it's something that could be done, but I don't know what the outcomes would be.

Q. Would an examination of Mr. Richardson and an examination of his records, such as they exist, allow you to investigate that and determine if there is a nexus?

A. The history that I've seen certainly set up what could be considered to be red flags to say there is something going on in this gentleman's life that would predict - early life

that would predict and lead to maladaptive and antisocial behaviors in later life. It certainly would offer rationale for further investigation.

Q. When you say red flags, would that be circumstances that would indicate that you should investigate?

A. That's right.

Q. Are you here today, Dr. Eubanks, to testify that there is such a nexus between the history of child abuse, if it occurred, and the crime?

A. No, I can't be.

Q. Okay. Have your views on the death penalty affected the opinions you have given today?

A. No.

Q. What are the opinions that you have given today based on?

A. The body of psychological knowledge that I've accumulated through my training and experience.

Q. Are you being paid today? Does that affect your opinion in any way?

A. I am not being paid, although I've been informed that a voucher will be put in to see if some kind of remuneration can be secured.

Q. And let me just step back for one moment because I want to make sure to clarify something. Is it your opinion that it would be more difficult now to determine a

nexus between the phenomena and history of child abuse, possible disorder, and later commission of a crime than it would have been in 1981?

A. The more distance between the possible causes and where we are in terms of time now, the more other variables have intruded into determining behavior.

Q. Would it be more difficult now, I take it from your earlier testimony, to determine what disorder, if any, Mr. Richardson may have suffered from in 1981?

A. Yes. I think so.

MR. LANE: Thank you, Dr. Eubanks. At this time, I'll pass the witness.

CROSS EXAMINATION ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Doctor, my name is Ed Shaughnessy. This is Roger Glass from the District Attorney's Office here in Bexar County. I take it you are a resident of Olmos Park; is that correct?

A. That's correct.

Q. And apparently from your resume you have lived in San Antonio for quite a period of time over the years.

A. I have.

Q. Were you a resident of San Antonio in March of 1979?

A. Let's see. I left - I was living in Houston at the time. I was in graduate school.

Q. Were you a resident of San Antonio in late 1981?

A. I was.

Q. All right. Do you recall the trial of Miguel Richardson?

A. I really don't.

Q. Or were you associated with it?

A. When I was told a little bit about it, there was a vague recollection, but I don't have any more than possibly remembering something about it.

Q. And you have reviewed two documents, I take it, regarding Mr. Richardson prior to testifying; is that correct?

A. I've actually reviewed quite a bit of stuff.

Q. Would you elaborate on what you reviewed?

A. Okay. There were medical records and documentation, reports about an incarceration that he had following an arrest and conviction for stealing some mail, a check.

MR. SHAUGHNESSY: May I approach the witness, Your Honor?

THE COURT: You may.

MR. SHAUGHNESSY: Could I see what you reviewed prior to your testimony?

THE WITNESS: Oh, sure.

MR. SHAUGHNESSY: Is any of this privileged?

MR. LANE: No.

THE WITNESS: And then these things about the careers and the affidavit from - let me make sure there is nothing else in here, please. Okay. You have it all.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Let me give you these back because we had access to these.

A. Okay. Thanks.

Q. Dr. Eubanks, is it your testimony or the summary of your testimony that based on what you reviewed, that a substantial possibility exists that in 1979 Miguel Richardson suffered from what is called an antisocial personality disorder?

A. No, that's not. My testimony says that there was an alleged history of child abuse and that this certainly could have great effects on a person's behavior. I don't know whether he met the criteria for antisocial personality disorder at that time or not.

Q. What would you need to review to determine whether or not Miguel Richardson was an antisocial personality in 1979?

A. Probably things that don't exist. Psychological evaluations of him growing through his childhood and adolescence and early adulthood.

Q. All right. You have the DSM-IV with you, right?

A. I do.

Q. And I believe we are talking about a list on page 649 and 50; is that right?

A. Correct.

Q. And at the bottom of 649 and the top of page 650, it contains what's labeled Diagnostic Criteria for a 301.7 antisocial personality disorder.

A. Right.

Q. Now, I'm a layman, and the rest of us here are layman in that respect.

A. Right.

Q. Is it my understanding, and am I correct in understanding that if someone meets these criteria, they are considered to be an antisocial personality; is that correct?

A. That would be the consensus of mental health. Yes.

it and we can move on. What harm is there in asking the question?

THE COURT: Mr. Lane, your objection is overruled.

THE WITNESS: This section?

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Yeah. The definition of incompetency to stand trial.

A. Okay. I don't see any indication in the record that he would meet these criteria.

Q. All right. Thank you very much.

MR. SHAUGHNESSY: Let me - may I approach the witness again, Your Honor?

THE COURT: You may.

BY MR. SHAUGHNESSY:

Q. Again, Doctor, referring to the 1981 Penal Code, the definitions of culpable mental states in Section 6.03 A and B. Let me show those to you. Here and right here. Could you read those to yourself?

MR. LANE: Your Honor, again, this is a clinical psychologist. He is not going to be examined on legal terms and legal meanings. We know that we apply their opinions towards legal findings, but for him to be cross examined on the legal terms themselves, I object to that.

THE COURT: Mr. Shaughnessy?

MR. SHAUGHNESSY: Well, Your Honor, I'm not cross examining him on what they are. I'm just going to do what I did immediately prior to this, and ask him whether there is any evidence that he's been exposed to that would indicate that Miguel Richardson, in 1979, would be incapable of forming one or the other of those culpable mental states. And if there is no evidence that he wasn't able to, then Mr. Cazier would not be ineffective for failing to prove it or pursue it.

THE COURT: The objection is overruled.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Have you had an opportunity to review?

A. Yeah. I'm on the second one. The wording is a little strange to me.

Q. It's stilted, there's no question.

A. Right. So, bear with me. I want to make sure I understand it fully, please.

Let me predicate this by saying there is always and shall be a difference between the legality of certain acts and the underlying behavioral predispositions to engage in activities, and that the two professions of law and psychology are not at odds in these but have different perspectives.

According to what I read here in the Penal Code, there is no indication to believe that he was not aware of what was going on in his immediate surroundings. According to mental health concepts, he could have been predisposed because of

his environmental and possible genetic variables to have engaged in activities which would lead to horrendous crimes.

Q. Right. And is it fair to say that there is no evidence that you have been exposed to that indicates, from a legal standpoint, as best you can understand it, that he was incapable of forming the intentional or the culpable mental state of acting intentionally or knowingly?

A. From what, as I understand it, I think that if we sat down and asked him what he was doing and why he was doing it and so forth, there may be reasonable, you may get reasonable answers to that.

Q. All right. But from what you have been exposed to, we have no reason to believe that he couldn't form one or the other of those culpable mental states?

MR. LANE: Objection, Your Honor, asked and answered twice.

THE COURT: Sustained.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Thank you, Doctor.

A. I need longer arms.

Q. Bigger books?

A. No. That's big enough.

Q. You don't have the DSM anymore?

A. I gave it to them.

Q. They can keep it. Let's go.

MR. SHAUGHNESSY: Can I approach the witness?

MR. LANE: I'll go ahead and give him his own copy. I don't want to make it inconvenient for him.

THE WITNESS: Thank you.

BY MR. SHAUGHNESSY:

Q. Doctor, I'm referring to 647, page 647, particularly associated features and disorders. Do you see that?

A. Yes.

Q. Okay. Now, once again, from the perspective

few on redirect.

THE COURT: All right.

MR. SHAUGHNESSY: Before we do that, Your Honor, let me tender back to the witness the documents that he was in possession of.

REDIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Dr. Eubanks, during the cross examination by Mr. Shaughnessy, he stated a number of facts which he stated he believed were supported in the record, and he asked you to pass upon whether they correspond to certain factors in the DSM. Do you recall that testimony?

A. I do.

Q. Now, I just want to be clear on this. Are you diagnosing, in your testimony did you mean to diagnose Miguel Richardson with antisocial personality disorder?

A. I did not.

Q. And in order to make any diagnosis or any examination, or reach any conclusion with respect to his condition, would it require more than the information Mr. Shaughnessy provided you?

A. I said that. Yes.

Q. And if you were to try and determine his condition as a professional, would it be customary for you to

rely on information supplied solely by, for instance, the District Attorney, if you were examining a defendant?

A. Not solely by anybody.

Q. Okay. You would want to consider other factors?

A. Correct.

Q. Now, I need to ask you to do this, but sometimes we have to pass upon our fellow professionals' work product. You have examined Betty Lou Schroeder's report; is that correct?

A. I have.

Q. And in your professional opinion, was the evidence in Betty Lou Schroeder's report adequate to support the opinions expressed in that report?

A. I don't think so, but she gave a diagnostic impression as opposed to a diagnosis. And I think that there could be some reason to say the impression is not a diagnosis.

Q. Okay. What is an impression versus a diagnosis?

A. I would imagine the degree of certainty that you use.

Q. Were the facts that were set forth in Mr. Shaughnessy's hypothetical even enough to base a diagnostic impression on?

A. We met two of the four criteria in the hypotheticals.

Q. And if you examined Mr. Richardson, would you consider other factors that might undermine that showing?

A. I certainly would want to go back and look at the conduct disorder areas. I would like to look at whether his behavior may have, in fact, been predicated upon abuse issues and environmental effects. I would want to look at whether there was a history in his parents and that generation of the same kinds of behaviors, not necessarily to the same degree, but to the same quality of antisocial or maladaptive behaviors to see if there might be a genetic component.

Q. I believe you stated that his actions might have sprung from genetic and environmental factors; is that correct?

A. Correct.

Q. And environmental factors, would include that history of child abuse?

A. Correct.

many attorneys may have defended those individuals? If you can only give a rough estimate, that's fine.

A. Here again, I would say defense attorneys, probably 12, 14.

Q. And has that situation changed substantially as we sit here today?

A. I think so, yes.

Q. Is it fair to say that there are three or four capital murder cases tried in this County a given year? Maybe even more?

A. More.

Q. To your knowledge, prior to this trial had Judge Dial ever presided over a capital murder trial in which the State was seeking the death penalty?

A. Yes, he had.

Q. Do you recall which one that was?

A. He tried Fred Durrough, I believe.

Q. Were you present for any of Durrough's trial?

A. Yes.

Q. And that portion would be, I take it, when Mr. Gifford testified?

A. Yes.

Q. Were you present during the course of the punishment phase of that trial?

A. I don't think so.

Q. All right. Do you know who represented Mr. Durrough at that trial?

A. Yes, I do.

Q. Who would that be?

A. Gerald Goldstein and Van Hilley.

Q. All right. Do you know if Mr. Goldstein and Mr. Hilley requested these what are now called Penry charges on behalf of Mr. Durrough in front of Judge Dial?

A. I don't know.

Q. All right. So, when you were representing Mr. Richardson, your decision on whether or not to request these charges, was that influenced one way or another by what Dial may have done or not done in the Durrough trial?

A. It had nothing to do with the Durrough trial, from my perspective.

Q. So, in your mind, did the possibility exist that --

MR. LANE: Your Honor, I believe he was still finishing his answer.

MR. SHAUGHNESSY: Go ahead.

THE WITNESS: I was only going to say that I never talked to Goldstein or Hilley about those instructions. The lawyers that I had talked to about those instructions were Sam Bashara and Sam Bayless, who had represented a person

whose name I want to say was Guillen, tried before Judge Ted Butler.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. And do you know whether Mr. Bayless and Mr. Bashara had successfully obtained those requested jury instructions?

A. They had. When I said with one exception, I didn't know of any other court ever granting those instructions. Judge Ted Butler did grant those instructions in the case that Mr. Bashara and Mr. Bayless tried, and that Defendant did receive a life sentence.

So then, at the time of Richardson's trial, at least one Judge in this County had given what is now known as a Penry charge?

A. Yes.

Q. And as far as you knew at the time of Richardson's trial, Judge Dial had never denied a Penry charge?

A. I don't know that he had ever had one requested, but I personally believed that he would not grant the charge.

Q. And ultimately he did not?

A. He did not.

Q. And, of course, you requested them in writing and preserved the error?

A. Yes.

Q. Okay. And that error, or perceived error, has been the subject of litigation in the appellate courts since when?

A. Well, certainly since the Richardson case got to the Court of Criminal Appeals.

Q. And that would have been in early 1983; is that correct?

A. I think so. Yes.

Q. And do you recall when Donald Franklin was executed, roughly?

A. '91, '92.

Q. All right.

MR. ROSENFELD: It's in evidence.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Did you discuss this charge with Judge Dial prior to - when I say charge, your Penry charge. I guess in context it could be called the Franklin charge.

A. Yeah.

Q. Did you discuss that charge with him prior to the charge conference that is in the record?

A. Not that I remember.

Q. All right. Did you discuss it with Mr. Williams?

A. I'm sure I did.

Q. All right. Did you discuss it with your client?

MR. LANE: Your Honor, I just want to clarify this. Is he inquiring into the subject matter of the instruction?

MR. SHAUGHNESSY: Right. The advisability of seeking this charge. Did you discuss that with your client?

MR. LANE: Your Honor, as to the subject matter, we don't have any objection.

THE WITNESS: I honestly don't remember.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. All right. There would be no down side to getting that charge, would there?

A. No.

Q. And the up side would have been that it

A. They would.

Q. They would have?

A. I think there probably would have been some inconsistency there, yes.

Q. Because it's my recollection, and I believe the record will support it, that Paquita Richardson testified that she and her brother, Miguel, grew up in a normal loving family; is that correct? Is that your recollection?

MR. LANE: Objection. We're characterizing the record again. It speaks for itself, according to Mr. Shaughnessy.

THE COURT: It's overruled.

THE WITNESS: Generally that's true. Yes.

BY MR. SHAUGHNESSY:

Q. And would you rather go to the jury with a conflict-free theory or would you rather try to take to them two different theories regarding your client?

A. Well, I would think you would want to avoid any conflict that you don't have to try to explain in front of a jury.

Q. So, is it then fair to say that there were down sides to presenting, or there would have been down sides to presenting this evidence of a turbulent childhood suffered by Miguel Richardson?

A. There would have arguably been a down side, yes.

Q. And virtually no down side to the testimony that you did present?

A. True.

Q. Because if memory serves me, Paquita Richardson had gone to college and was working for NASA at the time of the punishment phase; was she not?

A. She was.

Q. And was it a strategic decision on your part to present a professional woman with a college education who knew Miguel Richardson his entire life in an attempt to sway the jury to give him a sentence of less than death?

A. Yes.

Q. And if you were to try that case again, the punishment phase, tomorrow, and Paquita Richardson could still offer that testimony, would you try it again in that fashion?

A. In light of Penry, I'm not sure what I would do. I mean, in light of Penry, if I had my choice between Paquita and Julio, which one would I choose? I really don't know.

Q. But nevertheless, whatever it would be, it would be a strategic decision on your part?

A. True.

MR. SHAUGHNESSY: No further questions.

THE COURT: Let's take a break.

RECESS

THE COURT: Mr. Lane, let me ask you first, do you have any other witnesses?

MR. LANE: Your Honor, we have two witnesses after this. Well, we had Billie West on our list. He's going to be arriving tomorrow. We'll go with him and question him. As for today, I don't believe we have any today. Mr. Wetzel is somebody we intend to --

MR. SHAUGHNESSY: We have a witness, I guess, depending on - I guess it's semantics. We both want to have Mr. Wetzel testify. Who calls him, I guess, is - the State would call him out of order, if it's all right with counsel for the Petitioner.

MR. LANE: That's fine with us.

THE COURT: So we can anticipate finishing around 5:30, 6:00 o'clock?

MR. SHAUGHNESSY: Probably well before 5:30, I would think.

MR. LANE: Yes, Your Honor. I would imagine so. Now, when we finish up, we had mentioned to you before, we have one expert, Mr. Haney or Dr. Haney, we need to take out of turn. And also, I need to bring to your attention Roy Barrera, Sr.

THE COURT: I talked to him at lunch.

MR. LANE: His client was indicted. He is under water, and I would just ask - Mr. Shaughnessy has agreed that we take him out of turn later.

THE COURT: That's fine. Okay. You may proceed.

REDIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. I have a few more questions for you. You testified before the close of this, or before Mr. Shaughnessy was finished with you, Mr. Cazier, about what choice you would have made between two different theories at the penalty phase. Do you recall that testimony?

A. Yes.

Q. Okay. And that was a choice you didn't have absent the instruction; is that correct?

A. Well, I really didn't make that choice because, number one, I didn't know about the child abuse evidence, and so I was talking hypothetically what choice would I have made had I known about the child abuse. I'm just not sure.

Q. Let me ask you about that. Mr. Shaughnessy discussed his view, or presented to you that you would sift through all the facts available and decide what you wanted to pick out; is that correct?

A. Correct.

Q. Isn't it the case, though, that in defending a case, a capital case, you are really interested in developing evidence and investigating evidence, that you don't have the luxury to cast a wide net and just let it all sift out what you want?

A. I'm not sure I understand your question.

Q. Okay. In other words, had you been confident that you would get a Penry instruction, you would have actually been interested in developing the child abuse evidence; is that correct?

A. Well, see, at that time we didn't know what was Penry evidence and what wasn't. We didn't know what was Penry. All we knew was the jury should have some avenue for expressing their belief that there was some evidence that mitigated against death.

Q. In your experience, did the jury need some guidance to use the evidence that would be presented to it?

A. Well, that was our hopes in submitting the requested instructions, that the jury might, even though they really did honestly believe that this person might be dangerous in the future, they might nevertheless also believe that he didn't need to be executed. For whatever reason, whether it was because of a disadvantage childhood or because of some other reason. We didn't get the instruction.

Q. But absent your proposed instruction, is it your testimony that you were concerned that if you listed and put on child abuse evidence, it would only go against you and result in a finding of yes on the second issue?

A. At that time, it was my belief that child abuse evidence would support the anticipated testimony of Dr. Grigson.

Q. And when Mr. Shaughnessy asked whether Mrs. Richardson revealed to you evidence of child abuse, isn't it the case that you didn't ask her if he had been abused as a child?

A. I don't recall asking.

Q. Because you had no interest in developing that evidence?

A. I wasn't looking for it. I didn't ask. I didn't want to know.

Q. And the same was true of Mr. Richardson?

A. I don't remember asking him about what might be called child abuse, no.

Q. And the same was also true about Paquita?

A. I don't remember Paquita ever saying anything that wasn't pretty much rose-colored about her childhood with her brother and with her family.

Q. Now, if you had an expert who would testify that a person could live in an abusive household and yet still believe it was a normal, loving, supportive household, then that would reconcile any apparent conflict between those two views of the home that you might present in the penalty phase; is that right?

A. I would think so. Sure.

Q. But given the circumstances and the lack of any confidence on your part that you would obtain the instruction, you never had an opportunity to apply your strategic thinking to that puzzle, to that decision; is that correct?

A. Well, again, I didn't make a choice between offering or not offering child abuse evidence because I didn't know about the child abuse. I was surprised to learn what I learned when I read Julio Richardson's affidavit.

Q. And is it true by extension you didn't know about the child abuse at least in part because you didn't investigate it because it was not something you felt could possibly help your client?

A. That's true.

Q. And, in fact, it might very much harm your client?

A. I thought that it would.

MR. LANE: I have no further questions. Thank you for your time, Mr. Cazier.

RECROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. And it's also possible, even under the scheme utilized in penalty phases today, and the mitigating evidence charge that is submitted as a matter of law, that kind of evidence, that being child abuse evidence and the things that may or may not flow from it could still harm a given capital murder defendant at the punishment phase; could it not?

A. There are cases where it could, yes.

MR. SHAUGHNESSY: No further questions, Your Honor.

MR. LANE: Just one last.

REDIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Now days the jury is given a choice to consider it either way; is that right? Based on the instruction?

A. True.

MR. LANE: Your Honor, no further questions.

THE COURT: Thank you. You are excused.

(WHEREUPON, at this time, the
(Witness was excused.

MR. LANE: Before we turn to the issues relating to Mr. Wetzel's testimony, the Lackey evidence, we prepared a list of facts judicially

(6)

Supreme Court, U.S.
FILED
MAY 21 2001
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No. 00-1611
IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL RICHARDSON,
Petitioner,

v.

GARY L. JOHNSON, Director
Texas Department of Criminal Justice,
Institutional Division,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

IMMINENT EXECUTION SCHEDULED
FOR 6:00 PM JUNE 26, 2001

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I. PETITIONER HAS NEVER WAIVED HIS *PENRY* CLAIMS

Petitioner Richardson's principal argument before this Court is that the Texas court's failure to provide adequate mitigation instructions violated his rights under *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), because it deprived the sentencing jury of the means to give full weight to all constitutionally relevant mitigating evidence -- both evidence that was already in the trial record and evidence that trial counsel was prevented from developing by his knowledge that such an instruction would not be given. This *Penry* claim has been fully raised, briefed, and argued throughout all stages of this litigation.

Respondent erroneously argues (Respondent's Brief in Opposition "Resp. Br." at 22-24) that the portion of the petition which develops this issue in relation to the evidence actually presented at trial (*see* Petition for a Writ of Certiorari at 17-19) "is not properly before the Court" because the Fifth Circuit did not expressly deal with it in its eight page decision denying a certificate of appealability. (App. 1-12) There was no such waiver of that portion of Petitioner's argument.

Respondent concedes that, even in the Fifth Circuit, Mr. Richardson did argue -- as fully presented in his habeas petition (*see* App. 55-92) -- that the absence of a mitigation instruction precluded the jury from considering the mitigating evidence already in the record. (Resp. Br. at 22-23) Respondent's attempt to split Mr. Richardson's *Penry* argument into two separate issues does not fairly characterize the issue presented to this Court. Mr. Richardson has consistently argued that the absence of a mitigation instruction both prevented the

jury from considering the evidence already presented at his trial and precluded his counsel from presenting additional, constitutionally relevant mitigating evidence. The inability of the jury to give effect to mitigating evidence due to the trial court's failure to give a mitigation instruction renders Mr. Richardson's death sentence unconstitutional under *Penry I*. Mr. Richardson's singular claim that his death sentence violates *Penry I* was argued and decided below, and to properly before this Court.[1/]

1/ In addition, footnote 4 of Respondent's brief (p. 17) misrepresents Mr. Richardson's arguments, the holding of *Penry I* and the issue now pending before this Court in *Penry* v. *Johnson*, 121 S.Ct. 563 (2001) (granting *certiorari*) ("*Penry II*"). *Penry I* held that the Texas statutory scheme did not allow the jury to give full effect to the mitigating evidence presented. It did not endorse a specific instruction. In *Penry II*, petitioner argued that the trial court's attempt to comply with *Penry I* at Penry's second trial failed. The instructions proffered by Mr. Richardson's counsel were entirely dissimilar from the instruction at issue in *Penry II*, which was constitutionally flawed because it tied the jury's ability to give effect to mitigating evidence to the three special issues. The instructions proffered by Mr. Richardson's counsel were similar to those contemplated by this Court when it decided *Penry I*, which are now required by statute in all capital cases.

II. RESPONDENT MISCHARACTERIZES THE RECORD EVIDENCE

A. Richardson's Trial Counsel Testified that He Was Chilled from Developing Evidence Regarding Richardson's Abusive Childhood Because He Knew He Would Not Receive a Relevant Mitigation Instruction

Respondent distorts the record evidence from the state *habeas* hearing to suggest that trial counsel, Mr. Cazier, was not deterred from presenting or developing evidence relating to Richardson's history of childhood abuse. (Resp. Br. at 17)

Mr. Cazier testified that he had ample reason to believe that his proposed mitigation instructions would be denied. (App. 382) Though Mr. Cazier requested a mitigation instruction in five separate forms, he "thought it was unlikely that [the trial court] would grant those instructions." (App. 382) Mr. Cazier knew of only one case in which a similar instruction had been given -- and that case was presided over by a different judge. (App. 382-83) In all other cases, to Mr. Cazier's knowledge, similar requests had been denied. (App. 382-83) Mr. Cazier did not know if a similar instruction had been requested in the one death penalty case over which the trial judge had presided before Mr. Richardson's trial. (Supplemental Appendix ("Supp. App.") 28) He did know, however, that none had been given. (*See* Supp. App. 382) Mr. Cazier thus acted on the belief that the trial court would deny his requested instructions -- and he was correct.

Mr. Cazier also knew that the state's designated psychiatric witness, Dr. Grigson, routinely testified that capital

defendants suffered from "antisocial personality conduct disorder." (App. 385) Mr. Cazier believed that Dr. Grigson "would testify that child abuse was a predisposing factor, or one of the diagnostic criteria for, antisocial personality disorder." (App. 385) He legitimately feared that, without an instruction allowing the jury to give independent mitigating weight to the evidence, evidence of defendant's physical and sexual abuse as a child "would only support Dr. Grigson's diagnosis." (App. 386)

It was for these reasons, Mr. Cazier testified, that he did not investigate potential mitigating evidence that could be used to support Dr. Grigson's diagnosis:

> Well, in anticipation of the probable testimony of Dr. Grigson, I really didn't want to seek out and find any evidence that would corroborate his hypothetical diagnosis. I didn't ask about child abuse. I didn't go into it.

(App. 390) (*See also* App. 386) ("And for that reason, we didn't pursue that area.")

Respondent's suggestion that Mr. Cazier "didn't make [the] choice" not to pursue evidence of child abuse (*see* Resp. Br. at 17) is a gross distortion of the record evidence. At the hearing, Respondent questioned Mr. Cazier as to whether, *if* he had been given the choice between the two theories of defense *and* the benefit of a *Penry*-type instruction, he would have chosen to present evidence of a normal loving upbringing (in order to humanize the defendant), or to present evidence of child abuse. (Supp. App. 32-33) Mr. Cazier testified that he did not know, "in light of *Penry*," which theory he would choose. (Supp. App. 33; *see also* Supp. App. 36) Mr. Cazier testified,

in the passage cited by Respondents, that was the choice which he did not have at the time of trial. As Mr. Cazier clarified:

> Q: And is it true by extension you didn't know about the child abuse at least in part because you didn't investigate it because it was not something you felt could possibly help your client?
>
> A: That's true.
>
> Q: And, in fact, it might very much harm your client?
>
> A: I thought that it would.

(Supp. App. 38)

Mr. Cazier avoided learning of any child abuse evidence because he rightfully feared that the jury would not be provided with an instruction by which it could give that evidence mitigating effect. As he testified, "I wasn't looking for [evidence of child abuse]. I didn't ask. I didn't want to know." (Supp. App. 37)

B. Dr. Eubanks' Testimony Established a Constitutionally Sufficient Nexus Between the Mitigating Evidence and the Crime

Respondent similarly distorts the testimony of Dr. Joseph Eubanks at the state *habeas* hearing. Respondent asserts that Dr. Eubanks testified that he could not establish a nexus between Mr. Richardson's history of child abuse and the crime he was convicted of committing. Dr. Eubanks said no

such thing. Rather, he testified that childhood abuse could have significant, deleterious effects on a person's behavior later in life, and that Mr. Richardson's actions "might have sprung from genetic and environmental factors," such as a history of child abuse. (Supp. App. 26)

While Dr. Eubanks neither examined Mr. Richardson nor investigated the circumstances of the crime, he testified that, had he been presented with the child abuse evidence at the time of Mr. Richardson's trial, with proper investigation and examination, he might well have determined that a "strong correlation" or "nexus" existed between a history of childhood abuse and acts committed later in life. (*See* Supp. App. 12-14) However, absent an examination of Mr. Richardson he could not draw such a conclusion at the time of the state *habeas* hearing fifteen years later. This is precisely the basis of Mr. Richardson's argument: had the trial court given a mitigation instruction, allowing trial counsel to develop the child abuse evidence, an expert witness such as Dr. Eubanks would have had the opportunity to examine Mr. Richardson and testify to a nexus between his abusive background and the crime.

Dr. Eubanks' testimony is replete with evidence from which a jury -- had it been given the opportunity to do so -- could have found a constitutionally relevant connection between Mr. Richardson's history of childhood physical and sexual abuse and his culpability for the crime. Among other things, Dr. Eubanks testified that:

- The likely effects, in later life, of a history of child abuse are "very widespread, going anywhere from withdrawal and depression, social isolation, to very violent acting out behavior," and might "certainly"

result in criminal acts and "physical acting out" in acts of violence. (Supp. App. 4-5)

- A person with a history of child abuse is likely to respond differently to a stressful situation than a person who had not suffered such abuse. This reaction might include lashing out, acting impulsively, and reacting violently. (Supp. App. 13-14)

- A history of child abuse "certainly could have great effects on a person's behavior." (Supp. App. 18)

- Mr Richardson "could have been predisposed because of his environmental and possible genetic variables to have engaged in activities which would lead to horrendous crimes." (Supp. App. 21-22)

This Court has repeatedly held that evidence of a defendant's troubled background, including factors such as emotional or mental problems and child abuse, can be constitutionally relevant mitigating factors. *See Penry I*, 492 U.S. at 319; *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-115 (1982). Evidence of an abusive childhood is relevant to the jury's duty to treat a capital defendant as a "uniquely individual human being" and make a "reasoned moral response" regarding punishment. *See Penry I*, 492 U.S. at 319 (internal quotations omitted and emphasis omitted). Dr. Eubanks' testimony simply confirms that recognition by showing that, had defense counsel been free to develop such evidence, the facts of Mr. Richardson's abusive childhood could have been used by the jury as a reasoned moral basis for deciding upon a sentence less than death.

III. CONCLUSION

For the foregoing reasons, and for those previously stated, Petitioner respectfully requests that this Court issue a writ of *certiorari*.

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Respectfully submitted,
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